

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CLIMATEMP AIR CONDITIONING CO., INC.

and

Cases 4-CA-31251
4-CA-31514

LOCAL 44, SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION,
AFL-CIO,

Peter C. Verrochi, Esq., for the General Counsel
Richard M. Goldberg, Esq., of
Kingston, Pennsylvania for the Respondent
Patrick Andes of Wilkes-Barre, Pennsylvania for
the Charging Party

DECISION

Statement of the Case

ERIC M. FINE, Administrative Law Judge. This case was tried in Scranton, Pennsylvania, on November 14 and 15, and December 10 and 11, 2002. The charge and amended charge in case 4-CA-31251 were filed on April 22, and June 5, 2002, respectively, by Local 44, Sheet Metal Workers' International Association, AFL-CIO (the Union or Local 44) against Climatemp Air Conditioning Co., Inc., (Respondent).¹ The charge in case 4-CA-31514 was filed by the Union against Respondent on August 12. The consolidated complaint, as amended at the hearing, alleges Respondent committed numerous violations of Section 8(a)(1) of the Act, and that Respondent violated Section 8(a)(1) and (3) of the Act by: on or about December 3 or 4, 2001, discharging employee Shane Ruggere; on or about April 16, laying off employees Mark Falandys and Scott Makowski; on June 7, issuing a letter terminating Makowski, and since November 1, refusing to reinstate him to his former position because he engaged in a strike.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ All dates are 2002 unless otherwise indicated.

² The General Counsel's unopposed motion to correct the transcript, dated March 5, 2003, is granted and received in evidence as GC Exh. 20.

Findings of Fact³

I. Jurisdiction

Respondent, a corporation, with a facility located in Kingston, Pennsylvania, has been engaged in the business of fabrication and installation of heating, ventilation, and air conditioning systems for commercial and industrial customers. Respondent, during the past year, purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the state of Pennsylvania. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Respondent's operations

Richard Franks is Respondent's president and sole owner. Jeff Decker works for Respondent as project manager. Franks testified Gary Gensil was hired as a project manager in May 2002.⁴ Linda Conner works for Respondent as office manager.

The General Counsel alleges and Respondent denies that Sandra Franks (S. Franks) is Respondent's agent within the meaning of Section 2(13) of the Act.⁵ S. Franks, the wife of the owner, performs work for Respondent as a part time bookkeeper, although she does not draw a salary. She fills out unemployment and workers compensation forms for Respondent, and sends correspondence to vendors on a company letterhead. S. Franks handles the weekly payroll and answers employees' questions concerning their checks. Respondent gave its employees a wage increase in November 2001, and S. Franks was assigned the task, after receiving certain parameters from Franks, of determining the size of each employee's wage increase. S. Franks testified she derived the increase for each employee based on what she thought was fair in consultation with her husband. S. Franks has a computer and a desk at Respondent's office, although she spends the majority of her time working at home where employees can call her with questions. Franks designated S. Franks to layoff employees Falandys and Makowski on April 16 and S. Franks attended a meeting with Franks and the same two employees on April 22, called by Franks to discuss their layoff. S. Franks also attended a meeting with Franks and Union Organizer Patrick Andes on April 22, where Andes application for employment was discussed. I find Respondent has placed S. Franks in a position of apparent authority to Act in Respondent's behalf concerning her contacts with employees and S. Franks is an agent of Respondent within the meaning of Section 2(13) of the Act. See *GM Electric*s, 323 NLRB 125, 125-126 (1997).

³ In making the findings herein, I have considered the demeanor of all witnesses, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All of the witnesses' testimony and record evidence has been considered in making these findings. Testimony that is not mentioned has been considered but rejected.

⁴ While Decker and Gary Gensil maintained the same title, at the time of the hearing, Decker was a salaried employee, while Gary Gensil was paid by the hour.

⁵ Respondent's owner Richard Franks will be referred to as Franks, and Sandra Franks will be referred to as S. Franks. Respondent admits Franks and Decker are supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

In late 2001, early 2002, Respondent's field personnel included the following: Shane Ruggere, who prior to his December 3, 2001, discharge, worked as crew leader. Phil Dotzel and Don Gensil worked as crew leaders. Todd Murdock worked as a crew leader on small jobs. Dean Miller performed pipe installation and was referred to on the record by Franks as the pipe superintendent. Nick Dotzel, Phil's brother, worked as a service technician. Bob Switzer and John Augen worked as field installation employees. William Cook and Jeff Krupinski worked as field installation helpers. Mark Falandys and Scott Makowski worked in Respondent's shop, Falandys as shop foreman and Makowski as Falandys' assistant.⁶

B. Union activity amongst Respondent's employees⁷

Ruggere first contacted Local 44 around 1995 when he met with Organizer Andy Williams. Franks, in response to Ruggere's union activity, held a meeting with all of Respondent's employees. Ruggere's testimony reveals Franks made negative statements about the Union and told the employees if Respondent went union they may not be the best possible employees and they may be replaced. Franks testified he learned of Ruggere's involvement with the Union, during this time period. Franks testified as a result of learning this information, "I immediately called our legal people and asked them what I should do." Franks testified thereafter he held a meeting with Respondent's employees and told them Respondent had always been an open shop and he would like to stay that way. Ruggere ceased his union activity at that time.

Local 44 Organizer Patrick Andes met Respondent employees Ruggere and Cook on October 8, 2001, by flagging them down in one of Respondent's trucks. Andes discussed the Union's wages and benefits and gave them union literature and his business card. Thereafter, Andes and Ruggere met on October 10, 2001, at a bar in Wilkes-Barre to discuss the Union. Ruggere next set up a meeting with Andes on October 16, 2001, at Ruggere's home. Ruggere contacted employees and asked them to attend this meeting. Along with Andes and Ruggere, Respondent's employees Makowski, Falandys, Cook, Krupinski, and Murdock attended the meeting. They discussed union benefits, pay, and organizing. Andes handed out literature and told the employees about signing union authorization cards.

On November 20, 2001, Andes again met with employees at Ruggere's home. In attendance were Ruggere, Murdock, Falandys and Makowski. Andes testified that, since attendance declined, they decided not to meet again until January 2002, in order not to

⁶ Despite Falandys' foreman title and Ruggere's crew leader status, there is no contention by any party that they functioned as statutory supervisors.

⁷ The following findings are based on the credited testimony of Local 44 Organizer Patrick Andes, and as corroborated or supplemented by discriminatees Ruggere, Falandys, and Makowski. I found Andes and Ruggere, in particular to be credible witnesses. Andes had a good command of the sequence of events and testified in a forthright manner. Ruggere was a careful witness, who did not attempt to overstate his case. He admitted facts against his interest concerning his discharge such as Decker telling him he needed to call in more often, and Conner having to remind him on occasion to take his vehicle in for service. Moreover, Ruggere's version of events had a ring of truth to it. I also found Falandys and Makowski, by and large to be credible witnesses. I am aware their memories were prompted on occasion by leading questions, or in Makowski's case by reference to his pre-hearing affidavit. However, I find this was necessitated by the multiplicity of meetings they attended, and the breadth of their testimony, as opposed to an intent by either to fabricate.

jeopardize pending pay raises or bonuses. Ruggere and Falandys testified they planned not to have any more discussions with other employees about the Union until after the holidays. Ruggere testified that, after this meeting, he did not pass out any more union literature, but he may have mentioned the Union to people on the job.

5 Ruggere's credited testimony reveals: Prior to his December 3, 2001, discharge, Ruggere had several contacts with employee Dean Miller about the Union. Ruggere invited Miller to the October 16, meeting. Ruggere also called Miller after the October 16, meeting to discuss the Union. Ruggere met Miller at Ruggere's home, and during a follow up conversation
10 around the end of October or early November, Ruggere obtained information from Andes concerning the Pipefitters Union's rates and benefits, which he gave to Miller at work, since Miller did not perform sheet metal work.⁸ Ruggere had a phone conversation with Nick Dotzel about the Union, which took place between the October 16, and November 20, union meetings. Ruggere told him about the organizing campaign and the Union's benefits. Ruggere spoke to
15 Phil Dotzel about three times about the Union. The first conversation was mid to late October after the first union meeting. Ruggere discussed the benefits and said he would obtain information for him. Thereafter Ruggere gave union literature to Phil Dotzel at Respondent's Hilton Garden jobsite in early November. Ruggere had a follow up conversation with Phil Dotzel at the same site before the November 20, union meeting. Phil Dotzel told Ruggere he was
20 leaning against it, but would not make up his mind until the vote.⁹ Ruggere had at least one conversation with Don Gensil about the Union around the time he spoke to Phil Dotzel. The conversation took place at the Hilton Garden jobsite. Don Gensil told Ruggere he already knew about Ruggere's union activities and he was against it.¹⁰ Ruggere also discussed the Union with Bill Cook as they commuted to work. Ruggere told all of the employees he spoke to about
25 the Union the vote was secret and Franks "couldn't find out."¹¹

Makowski's credited testimony reveals he spoke to Phil Dotzel about the Union in between the October 16, and November 20, union meetings. Phil Dotzel told Makowski he did not want anything to do with the Union. Makowski talked to Miller about the Union in the shop,
30 during the same time period, and Miller said he would have to hear what the benefits were and how it worked before he made a decision. Makowski spoke to Miller again about the Union after

⁸ Miller, a current employee, testified for Respondent and he did not deny Ruggere's contacts with him about the Union.

35 ⁹ Respondent called Phil Dotzel as a witness. Phil Dotzel testified Ruggere called him at home and asked him to attend a union meeting. Phil Dotzel told Ruggere he would attend but did not do so. Phil Dotzel testified Murdock also talked to him about the Union. Phil Dotzel testified he was opposed to a union at Respondent. I have credited Ruggere's testimony over that of Phil Dotzel to the extent their testimony differed as to the number and nature of
40 Ruggere's contacts with Dotzel about the Union. Ruggere impressed me as a credible and careful witness who did not attempt to overstate his case. Dotzel, on the other hand, was testifying under the watchful eyes of Franks, whose opposition to the Union was well known to all of his employees.

45 ¹⁰ Respondent called Don Gensil as a witness. Gensil testified he was against the Union. Gensil testified he had heard about Ruggere's involvement with the Union from Phil Dotzel about 5 or 6 weeks before Ruggere was discharged. Gensil testified at the time he found out, Ruggere's involvement with the Union was "common knowledge" among Respondent's employees.

50 ¹¹ Falandys credited testimony reveals he discussed the Union with Cook on multiple occasions because they were neighbors until Falandys moved away in December 2001. Falandys testified one day Cook was for the Union and the next day he was against it.

the November 20, union meeting but before Ruggere's discharge at a jobsite. Makowski explained some of the benefits and Miller said he did not want anything to do with it.¹²

C. The Section 8(a)(1) allegations

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1. The December 2001 meetings with Franks

On December 3, 2001, Franks told Ruggere to report to Franks' office. Ruggere's credited testimony reveals Franks told Ruggere that he had to let him go. Franks said Ruggere was untrustworthy and Ruggere was undermining him. Franks gave Ruggere a dismissal letter, dated December 3, 2001, which reads in pertinent part, "You have continued to refuse to communicate with me; I can no longer allow this attitude in our company." "You have failed to maintain a leadership role as expected from a senior employee. Your attitude has caused decreased employee moral and performance from junior employees on the job site."¹³

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Falandys credibly testified that around December 10, 2001, Franks initiated a conversation with Falandys taking place in Franks' office. No one else was present. Franks showed Falandys Ruggere's termination letter and asked Falandys how he felt about Ruggere's discharge. Falandys said if you could fire a 17 year employee for "bullshit" reasons maybe Falandys would be next. Franks said as long as Falandys stayed in line and did what Franks told him nothing would happen to him. Franks said he had a problem with Falandys withholding information from him. Franks said he believed there were other employees in the company who were withholding information and he was not sure what was going to happen to these employees. Franks said he could not trust Falandys any longer and there were other men in the company he could not trust. Franks said he did not know what was going to happen to these employees. Franks said Andes should have done things differently in that he should have had the employees sign the authorization cards the first time he met them and they could have been pulled out of Respondent and working for Local 44.

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Makowski credibly testified Franks asked Makowski into Franks' office around a week after Ruggere's discharge. No one else was present.¹⁴ Franks said he was very disappointed in Makowski for withholding information from him. He showed Makowski Ruggere's termination letter and said the reasons Ruggere was fired were stated in the letter. Franks said he was not sure what he was going to do with people who could not be trusted. He said Andes was not too

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¹² While I have generally found Falandys to be a reliable witness, I have not credited Falandys' testimony, although uncontroverted, that he talked to Miller about the Union the same day but shortly before Ruggere was discharged. Falandys testified he told Miller that Andes was wondering if he could meet with Miller that Friday night for Miller to hear about the Union's wages and benefits. Falandys testified Miller said he would probably meet with Andes. In refusing to credit this portion of Falandys' testimony, I note there is no contention by Andes that he wanted to meet Miller after the November 20, meeting. Rather, Andes testified they planned to put a halt to their union activities until after the holidays.

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¹³ As a result of Ruggere's discharge, Andes held another union meeting at Ruggere's home on December 20, 2001. Andes, Ruggere, Murdock, Falandys, and Makowski attended the meeting. Andes testified he told the three other employees he did not want to jeopardize their jobs and that he was going to go away for a while.

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¹⁴ In his pre-hearing affidavit, Makowski testified Falandys attended this meeting. However, Makowski testified, at the hearing, that his affidavit was incorrect and Falandys did not attend. I have credited Makowski's testimony at the hearing on this point over that contained in his affidavit as neither Franks nor Falandys contended that Falandys attended this meeting.

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bright because he only needed three union cards signed to make the Union go through at Climatemp.

Falandys credibly testified on December 17, 2001, Franks asked Falandys and Makowski to come to Franks' office. Franks said he suspected Falandys of being a union organizer and showed Falandys a piece of paper from a company called Labor Ready with an attached list of temporary employees, who Franks said could replace Falandys. Franks said Respondent would never go union and he would shut it down before it goes union. Falandys said if he was replaced the quality of work coming out of the shop would vastly decrease. Franks said he pretty much knew what was being said letter for letter at all of the meetings and he knew what was going on. Falandys said he did not think anything was going on since Ruggere was fired because the employees were afraid to say anything about the Union. Falandys said even if something was going on he had a right to pursue another job or a Union. Franks said Falandys work was becoming unsatisfactory. Falandys said his work was the same as it always had been and Franks, not Falandys, was changing. Makowski, in large part, corroborated Falandys' description of this meeting. He testified Franks called both employees into the office and said their work was becoming unsatisfactory and he showed them a Labor Ready sheet, and said these people could take their jobs if their work did not improve. Makowski confirmed Franks said he would close the company down before he would allow it to become Union.

Franks version of these meetings differed from that of Falandys and Makowski. Franks testified the day after Ruggere was discharged all the employees started walking in and telling Franks they knew what was going on and why Ruggere had been fired. Franks testified he did not initiate any of the meetings with employees. Franks testified it was then that he learned for the first time there was union organizing activity amongst Respondent's employees because people who attended the union meetings told him about them. Franks testified the employees "pointed fingers" and gave names of employees who attended union meetings. Franks then testified the employees who were involved with the Union prior to December 3, 2001, brought it up during these meetings. Franks testified, "That would have been Mark Falandys, Scott Makowski and Billy Cook and Todd Murdock." Franks testified he showed everyone who came in Ruggere's termination letter as the reasons for his discharge and told them he had no intention of terminating people, or laying them off because of union activities.

Franks testified Falandys came into Franks' office a number of times between December 3 and December 10, to discuss Ruggere's discharge. He testified his first meeting with Falandys took place the day after Ruggere was fired when Falandys came into Franks' office and asked what they were going to do without Ruggere. Franks told Falandys they did not have a large backlog, and would make attempts to hire people. Franks testified Falandys told Franks that he attended union meetings at Ruggere's home, but that Falandys was not interested in the Union and he hoped it would not cost him his job. Franks responded Falandys had a job, and Ruggere was not discharged for his union activities. Rather, he was discharged for the reasons listed in his termination letter, which Franks showed Falandys.¹⁵ Franks testified, during one of these conversations, Falandys told Franks that Falandys was not the one who wanted to start a union. Falandys named other employees stating Cook was one of the people who were going

¹⁵ Franks testified he was surprised to learn about his employees' union activities. Franks testified, "as far as I'm concerned, what he saying, I was very upset about it because it was happening. I had no idea." Franks then claimed he was not upset employees attended union meetings. Rather, he was upset because Respondent had an open door policy, and no one told him they wanted to start a union.

to continue to organize.¹⁶ Franks contradicted his earlier testimony when he was later asked if Falandys had told him that Falandys attended union meetings, Franks testified, "In Mr. Falandys' case, I specifically remember it was another employee who said it."

5 Franks testified that, within the 10 day period following Ruggere's discharge, Makowski also came in to Franks' office several times, discussing the Union, and his future with Respondent. Franks testified he did not recall any specific conversations with Makowski, but he did recall Makowski told Franks that Makowski was not involved with the Union, and he did not want to jeopardize his job. However, Franks testified, in early December 2001, someone told
10 Franks that Makowski and Falandys had attended union meetings.

Franks testified that in response to Falandys' question about what Respondent was going to do concerning Ruggere's discharge, Franks told Falandys if they really get pushed for labor there were companies that would provide help and Franks showed Falandys a list from a
15 company that provided temporary labor.¹⁷ Franks testified Makowski may have been present when he showed Falandys the document from the temporary agency. Franks testified Falandys and Makowski each asked the same question, and they both got the same response in that they were shown the paper from the temporary employer. Franks testified he may also have shown the temporary employer document to other employees, "If they asked the question, ...". Franks
20 denied telling Falandys or Makowski that they could not be trusted, that he did not know what would happen to people who could not be trusted, that he said anything to them about Andes, that he accused them of withholding information, or that he threatened to closed the business if it went union.

25 Taking into account the witnesses' demeanor, I have credited Falandys and Makowski's account of the December meetings over Franks' version of the events. Franks initially testified Falandys voluntarily came in to Franks' office and told Franks that Falandys attended union meetings at Ruggere's home. Franks claimed, following this announcement, Falandys downplayed his interest in the union and then named other employees including Cook as having
30 a continuing interest to organize. However, Franks later denied Falandys told Franks that Falandys attended union meetings stating it was another employee who informed him of Falandys' activities. Franks also claimed that, although he did not recall the specifics of his conversations with Makowski, Makowski told Franks he was not involved with the Union. Franks went on to state that someone else, although he did not know who, informed Franks that
35 Makowski attended union meetings. Despite all this alleged confusion by Franks' as to his knowledge of the union activities on the part of his employees, at one point in his testimony he accurately stated he was told by employees that Falandys, Makowski, Cook, and Murdock attended union meetings. I do not credit Franks' initial premise that Falandys or Makowski voluntarily came into his office, or as he initially testified that Falandys disclosed he attended
40 union meetings to Franks or then fingered other employees to Franks. First Falandys and Makowski continued to attend union meetings after Ruggere's termination, the next one occurring on December 20, 2001, and I find it highly unlikely that they would voluntarily renounce those activities to Franks then continue to participate, nor do I credit Franks' claim that Falandys would name Cook as a participant to Franks. I also find it highly unlikely, that shop
45 employees Falandys and Makowski would initiate repeated meetings with Franks to discuss

¹⁶ Falandys and Makowski credibly denied initiating any meetings with Franks to discuss Ruggere's discharge, or that they named any employees who were involved with the Union.

¹⁷ Falandys and Makowski credibly denied the temporary employer was discussed as a source to replace Ruggere.

how the company was going to continue to operate because Franks had discharged field employee Ruggere, as Franks contended.¹⁸

The credited testimony reveals that within a week of Ruggere's discharge, Franks called Falandys and Makowski into Franks' office for separate meetings. While Falandys and Makowski had engaged in union activity at the time of these meetings, neither had theretofore announced their activity to members of management. I find that during each of these meetings, Franks violated Section 8(a)(1) of the Act by creating the impression of surveillance of the employees' union activities by criticizing union organizer Andes to the employees and telling them Andes should have had employees sign authorization cards thereby implying Franks was aware and keeping track of what occurred at union meetings. See *Link Mfg. Co.*, 281 NLRB 294 (1986), *enfd.* mem. 840 F.2d 17 (6th Cir. 1988) and *Flexsteel Industries*, 311 NLRB 257 (1993). I find that Franks violated Section 8(a)(1) of the Act by interrogating Falandys about his union activities when he showed Falandys leading union adherent Ruggere's termination letter and asked Falandys what he thought about Ruggere's discharge. The Board has held subtle interrogations designed to evoke a response concerning employees' union activities are violative of Section 8(a)(1) of the Act. See *Big Star No. 185*, 258 NLRB 300, 307 (1981), *enfd.* 697 F.2d 157 (6th Cir. 1983) and *Schwan's Sales Enterprises, Inc.*, 257 NLRB 1244, 1248 (1981), *enfd.* 687 F.2d 163 (6th Cir. 1982). I also find, in the context of discussing union adherent Ruggere's discharge while criticizing union official Andes to Falandys, that Franks violated Section 8(a)(1) by his telling Falandys to stay in line, do what Franks told him, and nothing would happen to Falandys in that Franks' remarks constituted a threat of discharge if Falandys persisted in engaging in union activities. See, *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462-463 (1995); and *United Charter Service*, 305 NLRB 150, 150, fn.2 (1992) and *B.E. & K., Inc.*, 260 NLRB 574, 576-577 (1982), where a violation was found where an employee was told as long as he kept "his nose clean" he would have a job. Similarly, I find Franks violated Section 8(a)(1) of the Act by criticizing Falandys and Makowski for "withholding information" from Franks and by telling Falandys there were other employees in the company withholding information and Franks was not sure what was going to happen to these employees. These remarks constitute a reference to employees' union activities and an attempt by Franks to unlawfully coerce Falandys and Makowski to divulge information about these activities. I also find Franks violated Section 8(a)(1) of the Act by telling Falandys that he could not trust him any longer, that there were other men in the company Franks could not trust and that Franks did not know what he was going to do with the people who could not be trusted. These remarks were a clear reference to employees' union activities thereby equating those activities with disloyalty and they constitute veiled threats for protected conduct.¹⁹

The credited testimony of Falandys and Makowski reveals that around December 17, 2001, Franks asked them come to Franks' office.²⁰ I find that, during the conversation that ensued, Franks violated Section 8(a)(1) of the Act by: creating the impression of surveillance of employees' union activities by stating he suspected Falandys of being a union organizer and that he knew letter for letter what was being said at all of the meetings; threatening to replace employees due to their union activities by showing Falandys and Makowski a list of temporary

¹⁸ For reasons set forth in detail in another section of this decision, I have also not credited Franks and Decker's claim that they were not aware of Ruggere's union activity before Franks discharged Ruggere.

¹⁹ See *Atlas Insulation*, 338 NLRB No. 47 (2002), slip op. at 2; and *Indiana Gas Co.*, 328 NLRB 623 (1999).

²⁰ I do not find that Falandys or Makowski had willingly disclosed their pro-union status to Franks at the time of the December 2001 meetings with Franks.

employees and stating they could replace Falandys and Makowski; and by threatening plant closure and informing employees their support of the union was futile by stating Respondent would never go union and he would shut it down before it goes union.²¹

2. The March meeting between Franks, Falandys, and Makowski

Falandys credibly testified to the following: In early March,²² Franks walked into the shop and spiked a fabricated piece of ductwork called a shoe tap on the ground as hard as he could and then summoned Falandys into Franks' office.²³ As soon as Falandys walked in, Franks told Falandys if he did not like working at Respondent "get the Fuck out." Falandys told Franks he did not understand why he was so upset about a shoe tap. Falandys said if there was a problem with the fabrication, they should discuss it with the project manager and figure out what was wrong. At about this time, Makowski entered the office, and Franks said Makowski, Falandys, and Pat, referring to Andes, were trying to take his company from him.²⁴ Franks said it was not going to happen and referred to his cousin Matt, in reference to Local 44's business manager, and said Matt knows how Franks felt about this. Franks said Falandys would never get a shop job in the Union because there were older guys who were entrenched in the shops, and Falandys would wait a long time. Franks said Falandys would have to work in the field. Franks also said Falandys would not get to work enough hours in the Union to enjoy full benefits because an employee had to work a certain number of hours each year to get pension credits. Franks said Falandys would be laid off before he enjoyed the full benefits of the Union. Falandys said these were good questions and he would ask Andes about them. Franks said Andes should have done things differently, that he knew what was going on at the meetings, and that Andes should have had the employees sign the cards. Makowski confirmed, that after spiking a shoe tap on the ground, Franks called Falandys and Makowski to a meeting in Franks' office. During the meeting, Franks implied their work was becoming unsatisfactory and said if it kept up they would be flipping hamburgers at McDonalds.²⁵

²¹ See *Feldkamp Enterprises*, 323 NLRB 1193 (1997), where the respondent violated the Act by threatening closure and implying it was futile to vote for the union because it would never agree to engage in collective bargaining.

²² While Falandys testified this meeting occurred on March 4, I have concluded he was mistaken about the date. In this regard, Franks testified Respondent was closed on March 4 to allow Respondent's personnel to attend the funeral of former Project Manager Jerry Suda. However, Franks admitted to meeting with Falandys and Makowski after Franks spiked a shoe tap, and I have concluded the meeting took place in March as Falandys and Makowski testified.

²³ A shoe tap is a piece of ductwork that connects a trunk line to the main line to feed areas in a building that cannot be reached by the main line.

²⁴ Falandys testified Makowski entered the office around halfway through the meeting.

25 Makowski had a difficult time recalling very much else of this meeting. He testified he was called out of the meeting to attend to a medical emergency and returned after a substantial period of time while the meeting was still going on. Makowski was shown his pre-hearing affidavit in an effort to refresh his recollection. Makowski then testified he vaguely remembered Franks bringing up their organizing without actually saying the word Union. Makowski testified, "He more or less told us that it would never happen with his company and he would do what was best in his powers to stop that from happening." Makowski's pre-hearing affidavit states Franks said he would shut down the company before he let them change it to union. However, Makowski had no independent recollection of this statement without reading it from his affidavit. Makowski then testified Franks said he knew every step that we were making because of his relative, Matt Franckowiak. Considering, the haziness of Makowski's recollection of this meeting for which he missed a large part I do not find the General Counsel has met his burden

Continued

Falandys testified following this meeting, he and Makowski discussed the shoe tap with Decker and, using a reference book, they determined they had been using wrong parts for the installation of the damper blade handle. This would, on occasion, cause the mechanism to bind when turning the handle. They corrected the problem by ordering the right parts. However, Falandys testified that, until he met with Decker, they had fabricated the shoe taps in the same fashion for the past 13 years. Falandys testified he did not see any other problems with the shoe tap Franks spiked. Falandys testified it was Decker's responsibility to order these parts. Similarly, Makowski testified they remade the shoe tap by using different parts to open and close the damper. Falandys and Makowski testified Franks did not point out a safety hazard concerning the shoe tap.

I do not credit Franks' testimony that he spiked the shoe tap because a large number of mechanical fastening pins were protruding from it as well as a large amount of other ductwork creating a safety issue for the field installers as well as a potential rust problem.²⁶ I have credited Falandys and Makowski's testimony that Franks did not raise a safety issue or the pins when he spiked a shoe tap.²⁷ In this regard, both testified that following Franks' action with the shoe tap they met with Decker, and decided the problem with the shoe tap related to the damper installation, which they corrected by Decker ordering different parts. Decker, although called as a witness by Respondent, did not deny these assertions. Franks denied saying Falandys and Makowski were trying to take his company from him, or they could not get a shop job with a union shop. He denied saying his cousin Matt knew how he felt about this.²⁸ Franks denied stating he knew what was going on at union meetings or that there was any discussion about the Union during this meeting.²⁹ However, considering the witnesses' demeanor and the content of their testimony, I have credited Falandys' account of this March meeting, as corroborated by Makowski, over that of Franks.

The credited testimony reveals that in early March, Franks spiked a shoe tap on the shop floor and thereafter summoned Falandys and Makowski into his office. As soon as Falandys walked in, Franks told Falandys if he did not like working at Respondent "get the Fuck out." Similarly, Makowski testified Franks implied their work was becoming unsatisfactory and said if it kept up they would be flipping hamburgers at McDonalds. Makowski also testified

of establishing the allegations contained in paragraph 5(c)(i)(ii) and (iii). Accordingly, these complaint paragraphs are dismissed.

²⁶ Franks admitted, on cross-examination, the field installers are issued safety gloves for installing ductwork, and that they are made of very strong material.

²⁷ Falandys testified, on rebuttal, there was an issue of pins protruding from ductwork raised by Franks, but he claimed this occurred 2 weeks before Franks spiked the shoe tap on the shop floor. Falandys testified the pin situation only involved around 12 to 15 pieces of ductwork, and it was caused by a malfunction in the welding machine. Falandys testified he noticed the problem the time the ductwork was made but did not think it was a safety problem because the employees wore heavy gloves when handling ductwork, and the protruding pins had rounded heads. He testified after Franks raised the issue, Makowski repaired the pins in about 3 hours. Makowski testified it took about 90 minutes to repair the pins and he was paid for his time.

²⁸ Franks testified that Local 44 Business Manager Matt Franckowiak has a similar last name to Franks' grandfather. Franks testified Matt Franckowiak and Franks used to jokingly refer to each other as cousins years earlier during apprenticeship training. Franks testified he refers to Franckowiak as cousin Mattie, although he does not believe they are related.

²⁹ Franks testified the problems with the pins in the ductwork had nothing to do with his subsequent decision to layoff Falandys and Makowski.

Franks said if they do not want to work for Respondent to get out. Since I have concluded that Franks did not point to anything structurally wrong with the shoe tap during this meeting, and in view of Franks ensuing negative remarks related to the employees' union activities, I find that by making these statements Franks threatened these employees with discharge because of their participation in union activities in violation of Section 8(a)(1) of the Act. In this regard, I find that, during the course of the meeting, as Falandys testified, Franks said Makowski, Falandys, and Pat, referring to Andes, were trying to take his company from him. Franks said it was not going to happen and referred to his cousin Matt Franckowiak, Local 44's business manager, and said Matt knows how Franks felt about this. Franks said Falandys would never get a shop job in the Union because there were older guys who were entrenched in the shops, and Falandys would wait a long time. Franks said Falandys would have to work in the field. Franks also said Falandys would not get to work enough hours in the Union to enjoy full benefits because an employee had to work a certain number of hours each year to get pension credits. Franks said Falandys would be laid off before he enjoyed the full benefits of the Union. Franks said Andes should have done things differently, that he knew what was going on at the meetings, and that Andes should have had the employees sign the cards. While I find Franks made these remarks as Falandys testified, these statements were not alleged as unlawful in paragraph 5(c) of the complaint in Case 4-CA-31251, the paragraph relating to this meeting. However, Franks' statements demonstrate a continued pattern of animus towards the employees' union activities. See *Meritor Automotive, Inc.*, 328 NLRB 813, 813 (1999), holding that, "It is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful." See also *Godsell Contracting*, 320 NLRB 871, 873 (1996) and *Stoody Co.*, 312 NLRB 1175, 1182 (1993), where unalleged interrogations were relied on as evidence of animus.

3. The Union's April meetings

Andes' credited testimony reveals: On April 8, Andes met with Respondent employees Ruggere, Makowski, Falandys and Murdock in Ruggere's home. During the meeting, Makowski, Falandys and Murdock signed authorization cards dated April 8, copies of which were introduced into evidence, and they decided to hand deliver a letter to Respondent the following Monday naming all three as union organizers. On April 12, Murdock called Andes and said he had been laid off, and he did not want Andes to name him as a union organizer to Franks because he performed side work at Respondent's shop, and he did not want to jeopardize this activity by telling Franks he was a union organizer. Andes testified side work is where Murdock was granted permission to use Respondent's facility and tools to perform his own work on weekends.

Andes credited testimony reveals: Andes met Murdock, Falandys, Ruggere, and Makowski at Murdock's home on April 15. Murdock had been drinking before and continued to drink during the meeting. Murdock was disruptive and continued to express concern about performing side work. Andes told Murdock that Andes could find him alternative locations to perform his side work, but this did not satisfy Murdock, who continued to be disruptive, and as a result the meeting ended. Following the meeting, Murdock called Andes on the evening of April 15 and called Andes a liar, stating Andes was not going to help him. Murdock told Andes that Murdock was a no vote and he had a Nextel phone with a direct link to Franks. Murdock said he was going to call Franks and tell him "you'se guys are organizing." Andes phoned Ruggere, Falandys, and Makowski and told them about Murdock's call.³⁰

³⁰ Falandys and Makowski confirmed Andes description of Murdock's behavior at the April 15, union meeting, and that Andes called them following the meeting and detailed to them

Continued

4. Falandys and Makowski's April 16 layoff³¹

Falandys credibly testified that, on the morning of April 16, Falandys had opened the shop and begun to work when, around 7:30 a.m., S. Franks came in through the back door with Murdock not too far behind her. S. Franks said she wanted to see Falandys and Makowski in the office. She told them Franks told her to tell them they were laid off due to lack of work. She asked Falandys for his company cell phone and his keys. Falandys said he did not feel safe giving her his cell phone because he had another paycheck coming. S. Franks told him not to worry about it, to give her the phone. As Falandys was removing his personnel tools from the shop, Murdock walked by and asked what he was doing. Falandys said you got drunk last night, called Franks told him everything and we were laid off because of you. Murdock did not respond, but just left the shop. Falandys saw Decker, in Respondent's parking lot, while Falandys was loading his tools in his truck. Makowski was there. Decker asked where Falandys was going. Falandys said S. Franks laid him off. Decker said S. Franks must be crazy as he had just given Falandys a fabrication list the day before with two weeks of work for Falandys and Makowski. Decker said there must be a mix up, and that he was going to talk to Franks and get back to them in the afternoon. However, Decker never called.³²

5. Falandys and Makowski's April 22 meeting with Franks and S. Franks

Falandys and Makowski returned to Respondent's facility on Thursday, April 18, to pick up their paychecks. Their credited testimony reveals every employee had a mailbox with a manila folder containing their name on it for messages in which the paychecks were deposited. However, their folders were removed from the mail slots. Office Manager Conner told them Franks wanted to speak with them Monday, 8 a.m. and they would get their checks then.

Falandys and Makowski met with Franks and S. Franks in Franks' office on Monday, morning April 22. Falandys credibly testified as follows: Franks started the meeting by asking Falandys what happened last week. Falandys said Franks knew what happened because Murdock told him the whole thing. Falandys told Franks that Falandys had asked the Union the questions Franks had raised in a prior meeting. Falandys said he liked the answers he received, and the Union offered him a card and he signed it. Franks said Falandys was a "back stabber," and a "bastard." Franks asked what thought process Falandys used to stick a knife in his back. Franks asked how Falandys could do this to Franks when Falandys had received loans from Respondent on one or two occasions. Franks said he did not blame Makowski because he was just following Falandys. Falandys told Makowski to tell Franks and S. Franks that he was as involved as Falandys from the beginning. S. Franks also told Makowski to tell them and Makowski said he was involved. Falandys asked Franks the purpose of the meeting and if Franks made him come there to pick up his check so Franks could yell at him and call him profanities. Franks responded it was not to give you a big kiss Brutus. Falandys said he wanted his job back stating Falandys did what was best for himself and his family and should not be penalized. Franks responded Falandys would never work at Respondent again except over Franks' dead body. Franks threw Falandys paycheck at him and told him to get out.

Andes' phone conversation with Murdock.

³¹ The April 16 layoff will be discussed in more detail in the Section 8(a)(3) portion of this decision.

³² Makowski basically confirmed Falandys' description of the conversations with Decker and S. Franks that occurred on the day of their layoff. Makowski saw Murdock in the shop that morning dressed in street rather than work clothes.

Falandys said he still had 8 and ½ hours pay coming, and he wanted it mailed to him. S. Franks said she did not know if they could find the pay for Falandys because he was not worth it, and he was certainly not worth a 34 cent stamp. Franks said his cousin Matt and Andes know how Franks feels about the Union and Respondent would never go union.

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Makowski confirmed that, during the meeting, Franks called Falandys profanities like “spineless bastard” and “back stabber.” Then Franks asked how Falandys could do this to him. Makowski testified Franks said he felt sorry for Makowski because he was forced into something that he did not think through. Then he threw their paychecks towards them. Makowski testified the employees asked Franks to mail them their last paycheck to them, and S. Franks told Falandys he was not worth the 34 cent stamp. They asked for their jobs back, and Franks said they would never work there over his dead body.

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Franks testified as follows about the meeting: Falandys and Makowski started telling Franks about their involvement with the Union. Franks asked why they did not come to him if there were problems stating he had an open door policy. They asked Franks why he was not interested in the Union. Franks responded Respondent does not perform prevailing rate work or work for government contractors. Franks said Respondent was in a niche where he chose to stay. Falandys and Makowski said they could not understand this, and they took their checks and left. Franks denied calling Falandys a spineless bastard, and he denied telling them they would never work for Respondent again. Franks testified, “one thing I learned is burning bridges is not a good way to conduct business. So down the road, five or 10 years, you never know.”³³ S. Franks testimony about the meeting was in clear contradiction to that of Franks. S. Franks testified, during the meeting, Franks said, “What’s going on with you guys?” Falandys said, “You know what’s going on; you know very well what’s going on.” Franks asked, “If you were having a problem, why didn’t you see me—what was going on with you guys?” S. Franks testified neither her husband nor the employees ever said what the problem was.³⁴

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I have considered the demeanor of the witnesses and the content of their testimony in crediting the testimony of Falandys and Makowski over that of Franks and S. Franks as to the content of the April 22, meeting. Moreover, the testimony of S. Franks was part of a clear pattern of Respondent’s witnesses refusing to acknowledge what they knew of the employees’ union activity. Franks testified that, during the April 22, meeting, Falandys and Makowski started telling Franks about their involvement with the Union, to which Franks asked why they

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³³ Franks “burning bridges” remark is a clear signal that he meant to permanently sever relations with these two employees because of their union activities, although they were supposedly only on a temporary layoff.

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³⁴ By way of background, S. Franks testified she had called Conner and told her to tell Falandys and Makowski when they came in to pick up their checks on April 18, to tell them to come in on Monday, April 22, instead because Franks wanted to see them. Conner called S. Franks back, and said when Falandys and Makowski came in they told Conner they already had other jobs. While Conner did not say where they were working, S. Franks testified she assumed they were working union jobs. When asked if she informed Franks that Falandys and Makowski were working union jobs, S. Franks became evasive answering the question with a question. She then testified Franks knew Falandys and Makowski had another job at the time he met with them on Monday morning April 22, but she went on to state she did not know whether Franks knew they were working a union job, stating she did not tell Franks. S. Franks testified Conner told Franks about their obtaining jobs. S. Franks testified after Falandys and Makowski left on April 22, she talked to her husband, and they assumed Falandys and Makowski were working for a union contractor.

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did not come to him if there were problems. Franks testified the discussion about the union continued during the meeting. Yet, S. Franks refused to acknowledge the Union was even discussed. She maintained that neither her husband nor the employees ever said what the problem was. She also incredulously claimed that, although she had concluded on April 18, that

5 Falandys and Makowski had obtained jobs for union contractors she never discussed this with her husband until just after their meeting with those two employees on April 22.

Prior to the April 22, meeting, neither Falandys nor Makowski had voluntarily disclosed their pro-union status to Respondent's management. However, for reasons discussed in a later

10 section of this decision, I have concluded that, prior to this meeting, Murdock had informed Franks that Falandys and Makowski had signed union cards on April 8. I therefore find Franks violated Section 8(a)(1) of the Act by coercively interrogating Falandys when he asked him what happened last week because it was a clear reference to Falandys' union activity. I also find

15 Franks violated Section 8(a)(1) of the Act by accusing Falandys of disloyalty when Falandys told Franks he signed a union card and Franks called him a back stabber, a bastard, and accused Falandys of sticking a knife in Franks' back. See *Belding Hausman Fabrics*, 299 NLRB 239, 241 (1990), enf'd. 953 F.2d 641 (4th Cir. 1992), where a remark that an employee had stabbed a

20 knife in a manager's back because of union activity was violative of Section 8(a)(1) of the Act since it was made in the context of other unfair labor practices suggesting possible retaliation from the respondent because of the employees disloyalty by supporting the union. In the instant case, Franks unlawfully interrogated Falandys and when Falandys truthfully responded, Franks cursed him, called him a back stabber, and told him he would only work at Respondent again

25 over Franks' dead body. Franks went beyond merely implying retaliation. I find Franks violated Section 8(a)(1) of the Act by signaling to Falandys his union activities were futile by telling Falandys Respondent would never go union, and that he violated Section 8(a)(1) of the Act by telling Falandys and Makowski they would never work in the building again except over Franks' dead body because they had engaged in union activities.

6. Andes' April 22 meeting with Franks and S. Franks

Andes accompanied Falandys and Makowski to Respondent's facility on April 22. After Falandys and Makowski came out of their meeting with Franks and S. Franks, Andes went into Respondent's facility and his credited testimony reveals the following transpired: When Andes

30 walked in he introduced himself to S. Franks stating he was a union organizer and he wanted to apply for work. S. Franks ran into Frank's office and Andes overheard her tell Franks, "the

35 Union's here, the Union's here, it's Mr. Andes." Franks told S. Franks to let Andes in. Andes entered Franks' office and introduced himself stating he was an organizer and he was there to apply for work. Franks said they were not looking for employees. Andes said he wanted to apply for future work and handed Franks a resume. Andes asked if he could fill out an

40 application and S. Franks said, "I don't think we want your kind working here." Andes asked Franks if this meant Andes could not apply for work. Franks responded Andes could apply and he told S. Franks to get Andes an application, which Franks gave to Andes and told him to take it home and fill it out. During the conversation, Franks asked how Andes, a union member,

45 could work in a non-union shop. Andes said there was no penalty for working in a non-union shop and if he was hired he would try to organize Franks' employees. Franks also discussed certain aspects of Andes' resume with Andes. Andes walked outside and filled out the application. The meeting lasted for 15 to 20 minutes.

S. Franks testified Andes introduced himself as a union organizer and when Andes

50 asked for an employment application S. Franks she said, "Why do you want to work here; you wouldn't fit in our small company." After S. Franks' remark, Franks told S. Franks to get Andes the application. S. Franks testified at the hearing, in explanation of her remark that, "most of our

people are related and friends, and I just didn't think he'd fit in." However, S. Franks testified she assumed at the time Andes knew Falandys and Makowski. When asked if there was any reason for S. Franks to assume Andes was not friends with some of Respondent's employees, S. Franks could only state, "I didn't really know him." S. Franks conceded all she knew about Andes was he worked for the Union.

I found Andes, considering his demeanor, to have testified in a credible fashion and I did not place great reliance on S. Franks' version of events. I therefore find S. Franks violated Section 8(a)(1) of the Act, when Andes asked if he could fill out a job application S. Franks responded, "I don't think we want your kind working here."³⁵ S. Franks' remark constituted a clear reference to Andes union activity since S. Franks admitted all she knew about Andes was his status as a union organizer. See, *Colden Hills, Inc.*, 337 NLRB No. 86 (2002), where the statement to a union organizer that his application was not taken seriously was found unlawful and *Industrial Construction Services*, 323 NLRB 1037, 1039 (1997), where similar statements were found to violate the Act. I do not find Franks disavowed S. Franks' remark, when he subsequently allowed Andes fill out an application. Allowing Andes to tender an application is not a quid pro quo for the conclusion the application would be given serious consideration. See, *Colden Hills, Inc.*, supra. Moreover, Franks failed to make a specific statement disavowing S. Franks remark, further clothing her with apparent authority for its content. See *Panelrama Centers*, 296 NLRB 711, 713 (1989).

D. The Section 8(a)(3) allegations and related conduct

1. Ruggere's December 3, 2001, discharge

a. Factual findings

Ruggere began working for Respondent in 1985, and he became a crew leader in 1990. Around 1995, Ruggere contacted the Union. Franks learned of Ruggere's union activity at the time, contacted his attorney, and then conducted a meeting with Respondent's employees where he told them Respondent was an open shop and he preferred it stayed that way. Franks said if Respondent went union they might not be the best possible employees and could be replaced. Ruggere did not pursue the union further at that time.

Ruggere was assigned to work as the crew leader for Respondent's Springside project in 2000, a project that lasted 9 months to a year, which Decker described as Respondent's first really large job. While working at Springside, Ruggere initiated a meeting with Franks where Ruggere, given the size of the project, complained of the composition of his crew, which consisted of Cook a new employee and Augen, a difficult employee.³⁶ Franks stated they would see what they could do if Ruggere needed help. Following completion of the work at Springside, Ruggere was assigned to be the crew leader at Respondent's next large project

³⁵ For the reasons set forth above, I found S. Franks to be a statutory agent for Respondent.

³⁶ I have credited Ruggere over Franks and Decker that Ruggere, not Franks, initiated the meeting at the Springside project. Considering their demeanor, I find Franks and Decker's claims that they held multiple meetings with Ruggere to discuss alleged attitudinal and performance problems at the Springside project and the subsequent Hilton Garden project to be lacking in credibility. Their testimony was vague, undocumented, and lacked specificity. Moreover, I view it highly unlikely that Franks would view Ruggere as such a problem employee, and then follow the Springside project by assigning him as the crew leader at the even larger Hilton Garden jobsite.

called the Hilton Garden. The Hilton Garden is a larger facility than Springside, and it was also a longer commute from Respondent's shop.

Ruggere met with Union Organizer Andes on October 8, 2001, and again on October 10, 2001, where they discussed the Union's wages and benefits and the possibility of organizing Respondent's employees. Andes held a union meeting at Ruggere's home on October 16, 2001, where 6 of Respondent's 12 non-clerical employees attended.

Effective November 19, 2001, Ruggere received a \$1.00 an hour pay increase. All of Respondent's employees received pay raises at this time. However, the amount accorded Ruggere, along with Miller, was the largest given to any of Respondent's hourly paid employees.³⁷

There was another union meeting at Ruggere's home on November 20, 2001, attended by four of Respondent's employees. By the time of the November 20, 2001, meeting, Ruggere had spoken to all 12 of the non-clerical employees about the union, several of whom he had multiple contacts, including long time crew leaders Phil Dotzel, Don Gensil, and long time employee Dean Miller, who was referred to by Franks as his piping superintendent.

Franks testified, while working at the Hilton Garden job, Ruggere told Franks Ruggere was not getting the recognition he deserved, and he was also unhappy about not receiving travel pay considering the distance of the job. Franks responded travel pay was not bid on the job, that he could look into it for future jobs, and that Ruggere was allowed to drive a company vehicle to the jobsite, which was a savings to Ruggere. Franks testified he asked Ruggere if there was anything else he wanted to discuss, Ruggere said no, and Franks thought the problem was solved.

Around mid to late November 2001, there was a safety meeting at the end of the workday at Respondent's shop. Ruggere attended but did not participate in the meeting, and he did not take rain gear, or a new first aid kit Respondent had placed on a table for distribution for employees. At the end of the meeting, Ruggere left with his crew without comment.

On December 3, 2001, Franks called Ruggere off of his jobsite and told him to come to the office. Once there, Franks told Ruggere this is the hardest thing he ever had to do, but he had to let him go. Ruggere's credited testimony reveals Franks said Ruggere was untrustworthy and Ruggere was undermining him. Ruggere said he understood. Franks gave

³⁷ S. Franks testified, that portions of Ruggere and Miller's increase went to compensate them for projected increases in family health insurance coverage that were to take effect in February 2002. I note a chart S. Franks prepared for the hearing showed Miller, Ruggere, Nick Dotzel, were scheduled to pay the same health costs under the new health insurance, yet Nick Dotzel only received a \$.90 an hour increase in November 2001. While S. Franks testified Franks told her to give the employees a general increase in November 2001, of 3.5 percent, none of the actual increases came out to that amount. Rather, adjustments were made. I do not credit S. Franks' claim that only \$.45 of Ruggere's \$1.00 increase was attributed to merit, and \$.55 was granted for an insurance adjustment. S. Franks admitted that, despite her theoretical break down of the reasons for the pay increase, Respondent and Ruggere were paying payroll and other taxes on the total \$1.00 increase he received as if the whole sum was a regular wage increase. Moreover, S. Franks' testimony reveals that Ruggere was never told his November 2001 wage increase was to be a partial compensation for increased insurance costs, which did not take effect until February 2002.

Ruggere a closed envelope with a dismissal letter. Ruggere's termination letter is dated December 3, 2001, and reads in pertinent part, "Your employment is terminated immediately. You have continued to refuse to communicate with me; I can no longer allow this attitude in our company." "You have failed to maintain a leadership role as expected from a senior employee. Your attitude has caused decreased employee moral and performance from junior employees on the job site." As of December 3, 2001, Ruggere was Respondent's highest paid hourly employee. Franks testified Ruggere was the first person Respondent ever fired.

Within a week of Ruggere's discharge, Franks called Falandys and Makowski, who had each attended both of the union meetings at Ruggere's home, into his office for separate meetings. Franks showed each of them Ruggere's dismissal letter. He told them both that Union Organizer Andes was foolish for not having employees sign authorization cards when Andes met with them. Franks accused each of withholding information from him, and said he was not sure what he was going to do with employees he could no longer trust. Around a week later, Franks called Falandys and Makowski in for a joint meeting. Franks said he suspected Falandys of being a union organizer, and showed them a list of temporary employees who Franks said could replace them. Franks said Respondent would never go union and he would shut it down before it did. Franks said he knew what was going on at the meetings. I have found, for reasons previously stated, that Franks violated Section 8(a)(1) of the Act by this and other conduct.

b. The General Counsel's prima facie case

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993). Knowledge of an employee's union activity may be inferred from circumstantial evidence including the timing of the alleged discriminatory event and the submission of pretextual reasons in support of it. See *La Gloria Oil and Gas Co.*, 337 NLRB No. 177, slip op. at 4 (2002); *Howard's Sheet Metal, Inc.*, 333 NLRB No. 49 (2001), JD slip op. at 4 (2001); *West Motor Freight of Pennsylvania*, 331 NLRB 831, 836 (2000); *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998), enfd. 207 F.3d 67 (1st Cir. 2000); and *North Atlantic Medical Services*, 329 NLRB 85 (1999). The Board also considers the small size of a work force, which here consists of 12 employees, in determining a Respondent's knowledge of an employee's protected conduct. See *Metro Networks, Inc.*, 336 NLRB No. 3 (2001); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996); and *Weise Plow Welding Co.*, 123 NLRB 616, 618 (1959).

I have concluded that the General Counsel has made out a prima facie case that Ruggere was unlawfully discharged. Ruggere was a 16 year valued employee who engaged in union activity within the 2 month period prior to his discharge. Up until that time, Ruggere had been selected to be the crew leader on Respondent's two largest projects. Ruggere's union activity was extensive; he had personally contacted all of Respondent's 12 employees about the union, made multiple contacts with some of them, and held two union meetings at his home. Respondent harbored strong animus towards employees' union activities as demonstrated by

the numerous violations of Section 8(a)(1) of the Act committed by Franks, its owner and chief operating official.

I reject Franks and Decker's claims that they were not aware of Ruggere's union activity at the time Franks' discharged him on December 3, 2001. There were 12 non-office employees on Respondent's staff, and six of them attended a union meeting at Ruggere's home on October 16, and four attended a meeting at Ruggere's home on November 21, 2001. The testimony of Ruggere, Makowski, Phil Dotzel, and Don Gensil revealed that by the time of the November 21, meeting, all 12 employees had been contacted to attend a union meeting, or were otherwise aware of Ruggere's attempt to organize Respondent's employees. Respondent witness crew leader Don Gensil testified he heard about Ruggere's union activities 5 or 6 weeks before Ruggere was discharged and by that time it was "common knowledge" among Respondent's employees. Crew leaders Don Gensil and Phil Dotzel had been working for Respondent for over 10 years, and Miller, who Franks referred to as his piping superintendent, had worked there since 1993. These three individuals were called as witnesses for Respondent. They were closely aligned with management and each testified they were in strong opposition to the Union. They all reported to Respondent's facility on a daily basis to pick up their crews and equipment. They also were connected to Project Manager Decker, a stipulated supervisor, on a daily basis via Respondent's cell phone system. Decker, who had worked for Respondent for 22 years, testified he spoke to the crew leaders three to five times a day by way of Respondent's phone system. Don Gensil and Phil Dotzel also testified they reported to Franks and Decker perceived attitudinal problems on the part of Ruggere leading up to his discharge, but incredibly claimed they never discussed Ruggere's union activity with management before he was discharged. Given the anti-union posture of Don Gensil, Phil Dotzel, and Miller, to the point, discussed later in this decision, where Miller challenged Falandys to a fight and Dotzel and Miller testified they thought the employees' union activities were putting their jobs in jeopardy, the frequent contact of these individuals with Decker and Franks, the small size of Respondent's staff, the "common knowledge" of Ruggere's union activities among Respondent's employees, I do not credit the testimony of Respondent's witnesses that Franks and Decker were not apprised of Ruggere's activities before he was discharged. This is particularly so given the pretextual nature of the reasons advanced by Franks and Decker for the discharge of a 16 year employee 2 months after he attempted to organize Respondent's staff.

In concluding Franks and Decker were aware of Ruggere's union activity, I have considered Ruggere's testimony that he cautioned employees that the vote was secret and Respondent could not find out, as well as the testimony of the General Counsel's witnesses that after the November 21, union meeting, there was a conscious decision to keep their union activities quiet. However, by that time, all of Respondent's employees were aware of the Union campaign, and for the reasons set forth above I have concluded one or more apprised management of Ruggere's activities. Cases cited by Respondent concerning employer knowledge or the small plant theory do not require a different result. *Hadley Manufacturing Corporation*, 108 NLRB 1641, 1650, (1954), is distinguishable from the current case in that there were no independent Section 8(a)(1) findings in *Hadley*, and close in time to the alleged Section 8(a)(3) conduct, Hadley's work force numbered close to 80 employees. In *Mantac Corporation*, 231 NLRB 858 (1977), the employees' union activity only occurred on one occasion away from Respondent's facility, the judge discredited the testimony of the alleged discriminatee that he reported the activity to management and there were no other unfair labor practices found. In *Bryant & Cooper Steakhouse*, 304 NLRB 750, 751-752 (1991), there was a larger workforce, 30 employees, then in the current case, and in refusing to find a violation the Board noted the respondent did not depart from its past practice of not discharging employees because it had recently converted to a more upscale restaurant therefore prior performance standards were not applicable. In *TeleTech Holdings, Inc.*, 333 NLRB No. 56 (2001), the Board

found the General Counsel did not establish knowledge of the union activities where the respondent employed over 1000 employees and 400 of them worked at the facility in question. Thus, each case must be decided on its own facts, and I have concluded taking into consideration the small size of Respondent's work force, the knowledge of Ruggere's union activities by every employee including the crew leaders and the strenuous opposition to those activities by the crew leaders, the admitted reports of alleged attitudinal problems on the part of Ruggere by those crew leaders to Franks and Decker, and the constant communication to which Decker and Franks testified was maintained between management and the crew leaders that both Franks and Decker were aware of Ruggere's union activities before his discharge.

Moreover, Ruggere's dismissal letter, which Franks showed to all of Respondent's employees, contained nebulous allegations about Ruggere's "attitude" which are often equated by the Board as oblique references to protected conduct. See, *Sears Roebuch & Co.*, 337 NLRB No. 65, JD. slip op. at 8. Along these lines, Ruggere's testimony reveals that, during his discharge interview, Franks told Ruggere he was untrustworthy and was undermining Franks, which I have concluded were also veiled references to Ruggere's union activity. Franks made similar accusations to Falandys and Makowski, shortly after Ruggere's discharge, when he accused them of withholding information, stating they were untrustworthy, and that he did not know what he was going to do to people he could not trust. From the totality of the circumstances here I have concluded Franks was aware of Ruggere's union activity before discharging him, that Franks harbored strong animus to that union activity, and the timing of the discharge warrants a finding that the General Counsel has made out a strong prima facie case under the Board's *Wright Line*, supra, requirements. The burden of persuasion shifts to Respondent to show it would have taken the same action absent Ruggere's union activity. I find for the reasons set forth below Respondent has failed to meet this burden and that the reasons advanced for Ruggere's discharge are pretextual.

c. Respondent's reasons for Ruggere's discharge

Franks testified Ruggere's performance began to deteriorate while he was the crew leader at Respondent's Springside project in 2000.³⁸ Decker told Franks of problems with the progress of the job and suggested Franks talk to Ruggere. Franks testified he initiated a meeting with Ruggere at the site, at which time Ruggere told Franks he was unhappy with the size of the job, which Franks first said was a medium, and later testified was a medium to large job.³⁹ Franks testified Ruggere also said he was unhappy doing ductwork, and that he might want to be a firefighter, or a ceiling installer.⁴⁰ Franks testified he told Ruggere that he was expected to perform the work. Decker also testified that Ruggere's attitude and performance deteriorated as the Springside job. Franks testified, at Springside, Respondent was incurring over runs in bid for man-hours, which cut into profits and the root of the problem was Ruggere's failure to train his crew and to delegate work sufficiently. Franks testified Ruggere had Murdock, a middle level employee, and two helpers Augen and Cook at the Springside job.⁴¹

³⁸ Decker testified the Springside job lasted 9 months to a year. Respondent had to install 200 to 300 individual units in rooms as well as separate ducted systems.

³⁹ Decker testified Respondent's jobs were starting to increase in size and Springside was the first really large job. However, he then testified this was not a new challenge for Ruggere, it was just a little larger than prior jobs. Decker then changed his testimony again stating Respondent did have larger projects, which Ruggere had worked on in the past as crew leader.

⁴⁰ Decker also testified, during the Springside job, Ruggere told Decker he did not like what he was doing and he preferred to be a ceiling contractor.

⁴¹ Franks testified Ruggere complained about the crew members assigned to him on the

Continued

Franks testified Augen and Murdock in particular needed training. Franks then changed his testimony stating Murdock had been with the company since 1992 and did not need training, but needed more freedom to do the work. Franks testified Augen was main person in need of training, although it was stipulated Augen was hired in 1996. Franks testified Cook was a new employee. Despite his largely placing the blame for Augen's performance on Ruggere, Franks admitted Augen was not a model employee. Franks also testified crew leaders Phil Dotzel and Don Gensil preferred not to have Augen on their crew. Decker testified he observed Ruggere was only assigning his crew one task at a time, and when that task was completed they were standing around. Decker testified this impacted on the men's morale. Decker testified he spoke to Ruggere about the problem between two and seven times. Decker testified Augen was initially Ruggere's only helper at Springside and Ruggere's crew consisted mainly of Augen and Cook, a new employee. Decker testified Augen was a poor employee.

Franks testified there were instances at Springside when Ruggere ordered fabricated pieces from the shop, then brought them back and disposed of them in Respondent's dumpster without Respondent's knowledge. Franks testified Decker discovered this through questioning one of Respondent's employees and informed Franks. Franks also testified either Murdock or Cook told him about this on more than one occasion. Franks testified if a mistake involves a structural issue resulting in a fitting having to be remade, it could result in a change order, where Respondent would be paid for the repeated work through negotiations with the general contractor. When fittings or material come back and are not reported, management has no opportunity to determine if it is something for which Respondent should be compensated. Franks testified he talked to Ruggere about the dumping of materials and Ruggere replied it was just excess material, not excess fabricated pieces. Franks testified the dumpster issue was one of the reasons Ruggere was discharged. However, he then testified, "I thought (it was) a one-time occurrence, as far as one job. And, after we talked about it, I thought the problem went away. And, no one reported after that, that it occurred again."

Franks testified the crew leader is required to check in with Decker using Respondent's Nextel phone system at least once a day, in addition to calling the office to report any problems. Decker told Franks that Decker was not receiving field reports from Ruggere, which was necessitating Decker to contact Ruggere by phone or go to the site to determine the status of jobs. Franks testified he had several conversations with Ruggere concerning his communication skills and Decker talked to him more than Franks did. However, Ruggere continued to fail to phone in as requested. Franks testified this behavior probably started around the time of the Springside project and became worse after Ruggere went to the Hilton Garden. Decker also testified there were problems with Ruggere's communication at Springside, and the crew leaders were required to check in a minimum of once, if not multiple times a day, which was necessary to keep Respondent profitable.⁴² Decker testified he had to visit Springside to gauge the progress of the job because the answers Ruggere gave him when they did talk were too vague.

Decker testified there were also profit problems at Springside because Ruggere made changes in the field without always consulting with Decker or Franks. Decker testified he spoke to Ruggere and Franks about this problem. Ruggere gave an ambiguous response such as

project. Franks told Ruggere the employees at the site were people Ruggere recommended for employment, that if he was having a problem to address it with them, and if Ruggere could not solve it to talk to Franks.

⁴² Decker testified he has worked for Respondent for 22 years, and that he will speak to some of the crew leaders as many as 3 to 5 times a day.

“You know, I don’t know.” Similarly, Decker testified at Springside there were a lot of daily call-in problems for fabrication indicating Ruggere was not planning the required 2 days a head. Decker also reported this to Franks.⁴³ Decker testified the daily call-in constitutes an emergency, which means the shop has to alter its fabrication plans. When asked to provide a specific example of problems at the Springside job, Decker testified the ductwork had to be installed more than once in the dining room and corridors because it was not installed in the correct place. However, Decker testified that when it was fabricated the ductwork was too large for the allotted space in the ceiling, and he conceded this involved mistakes by individuals at higher levels than Ruggere. Decker was unable to provide any specifics of mistakes at Springside caused by Ruggere’s performance.

When the Springside job completed, Franks testified he told Ruggere the next project, the Hilton Garden, was a larger project and that a similar performance to the one at Springside would not be tolerated.⁴⁴ Franks suggested Ruggere take the time between the two jobs to train his crew and get used to delegating work. Franks testified he had five or six meetings with Ruggere between the Springside and Hilton Garden where Franks discussed Ruggere’s performance. However, subsequent reports from Decker revealed no change in Ruggere’s attitude or performance.

Franks testified there was a problem at the Hilton Garden job in that insulated ductwork was not properly wrapped with plastic to protect it from moisture before it was installed. The project engineer discovered the unwrapped ductwork and the engineer’s initial reaction was to order the ductwork be replaced, but Franks was able to resolve the situation without actually replacing large amounts of ductwork. Decker testified Don Gensil and Phil Dotzel performed some preliminary work at Hilton Garden as crew leaders and Ruggere arrived at the project about 2 weeks after Respondent started there. Franks and Decker testified, while Ruggere was the crew leader at the site, the ductwork was installed that was not properly weatherproofed. Decker testified about 30 man-hours for Respondent’s employees were required to correct the mistake. Decker testified Ruggere’s attitude and job performance did not improve at Hilton Garden job and Decker reported this to Franks and discussed it with Ruggere.

Franks testified Respondent maintains a schedule for the maintenance of company trucks. On several occasions, vehicle maintenance appointments were made for but missed by Ruggere without his informing Respondent’s office. This was a continuing situation occurring in 2000 to 2001, but it happened more frequently while Ruggere was at the Hilton Garden jobsite. Franks testified he learned from Decker and Conner that Ruggere was engaging in this behavior around 6 months before he was terminated and during that time Ruggere missed three to five maintenance appointments. However, Franks testified, even when Ruggere missed an appointment, the truck was serviced as Ruggere would eventually take the truck in. Franks testified vehicle maintenance was one of the issues leading to Ruggere’s discharge. Franks testified he spoke to Ruggere at least twice about not keeping maintenance appointments. Franks testified the shops Respondent used for maintenance had Saturday hours. Franks testified Ruggere had the same truck assigned to him from the day Respondent purchased it to the date of his termination. He testified Respondent had a file for the vehicle containing its

⁴³ Franks also testified Ruggere failed to provide material requests to the shop the required 2 days a head of time and that Ruggere had no explanation for the dilatory requests.

⁴⁴ Decker testified he told Franks he did not think Ruggere could run Hilton Gardens in a profitable fashion. Nevertheless, Franks chose Ruggere as the crew leader at Hilton Gardens.

maintenance records, including mileage and maintenance dates. However, these records were not entered into evidence.⁴⁵

Franks testified the final straw leading to Ruggere's termination was Ruggere's refusal to participate during a November 2001 shop safety meeting. Ruggere leaned up against a piece of sheet metal equipment with his head down, and the two people on his crew, at the time, Cook and Murdock assumed the same posture. First aid kits, which were OSHA requirements,⁴⁶ and rain suits, were placed on a table for distribution at the meeting. Franks testified he told the crew leaders they were required to take the first aid kits, but Ruggere refused to take either item. As soon as the meeting ended, Ruggere, Cook and Murdock turned and walked out the door. Franks testified it was customary for employees to hang around a little bit after the meetings to talk about work at the jobsites. Franks testified that, "At that point, I had realized in my own mind that the situation had gotten to the point where there were people starting to follow Mr. Ruggere with his attitude and performance. And, at that point, I made the decision, the time had come." Ruggere was discharged within a week or two of the meeting. Franks testified he waited before discharging Ruggere to make sure it was the right decision. Franks testified, after the meeting, Don Gensil and Phil Dotzel came up to Franks stating they thought Franks spoke to Ruggere about getting his problems straightened out. Franks testified Ruggere's attitude and demeanor at the meeting caught Gensil and Dotzel's attention. Franks testified that prior to the shop meeting, Dotzel and Gensil had come to Franks and Decker several times saying there were some performance and attitude problems with Ruggere. Franks testified in reference to Ruggere's purported problems, "they were aware of them being in a small company and, so, that's how they knew of them."⁴⁷

Respondent witness Phil Dotzel testified he and Ruggere were in their normal positions during the shop meeting in that Phil Dotzel was sitting on the shear and Ruggere was leaning against it. He testified through the whole meeting, Ruggere's head was down looking at the floor. Dotzel testified he only spoke to Franks on one occasion about Ruggere's attitude and that was after the safety meeting. Dotzel testified he and Don Gensil approached Franks at the end of the meeting, because Dotzel heard through Decker that Franks was going to talk to Ruggere about his attitude. They asked Franks if he ever talked to Ruggere about his attitude. Franks said he had but Ruggere's attitude did not change.⁴⁸

⁴⁵ Franks testified, after Ruggere's discharge, when Ruggere's truck was taken out for its initial service, Franks learned Ruggere tried to add an inordinate amount of oil to the truck for the Hilton Garden commute in that Franks was told the truck was burning about 2 quarts of oil every 1000 miles. The air filter had also been left off the vehicle, which allowed dirt to get into the engine. Franks testified the truck had to be repaired at substantial cost. Again no records were placed into evidence.

⁴⁶ Franks testified the first aid kits had an expiration date and were to replace older kits.

⁴⁷ Franks acknowledged the safety meeting was at the end of the day and the employees may not have been paid for their attendance. He also testified following the meeting, Ruggere could have been dropping Murdock and Cook off at their homes in the company truck. He testified the meeting took place in the shop, which does not have a lot of chairs; therefore Ruggere's leaning on a machine was not an issue. Franks testified the raincoats were not as important as the first aid kits.

⁴⁸ Phil Dotzel testified he had previously spoken to Decker about Ruggere's performance and attitude concerning the Hilton Garden job. Dotzel testified he did not work with Ruggere very often, that he was at the Hilton one day, and it seemed like Ruggere did not want to be there. He testified Ruggere did not like the travel and he did not like working at the big hotels. He testified he told Decker, "Shane's attitude sort of like deteriorated," and "It wasn't the normal

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Respondent witness Don Gensil testified in addition to Ruggere, Makowski, Falandys, and Cook were not participating in the shop meeting or otherwise paying attention. Gensil testified he asked Franks at the close of the meeting if he had talked to Ruggere because he thought Franks was going to get Ruggere's problems straightened out. Yet, Gensil also testified it was not unusual for employees not to say anything during these meetings.⁴⁹ Franks testified on December 3, 2001, a Monday, he concluded things were not going to get any better and he decided to discharge Ruggere.⁵⁰

d. Analysis concerning Ruggere's discharge

Respondent's witnesses changed their testimony as to the size of the Springside project, however, I have concluded, in view of Decker's initial admission, that Springside was Respondent's first really large job, and that it is likely, as Ruggere testified, and Franks eventually admitted, that Ruggere complained to Franks about Cook, a new employee, and Augen, a problem employee constituting Ruggere's crew.⁵¹ I have therefore credited Ruggere's testimony that he, not Franks, initiated the meeting with Franks at the Springside project to complain about his crew. I do not credit Franks and Decker's claims that the meeting was

Shane." However, Dotzel testified he never observed Ruggere failing to put in a full day's work. Dotzel testified Decker told him Ruggere was not calling in, there was a problem with his attitude, and no coordination. Dotzel testified when he heard this, "I just couldn't believe it was Shane, but, you know, it's –I don't know." Dotzel testified Ruggere was a good sheet metal man. "We all looked up to him...". Dotzel testified in the past Ruggere, joking around, said he did not want to do sheet metal. Rather, he wanted to do sheet rock, or install ceilings.

⁴⁹ Don Gensil testified he noticed a change in Ruggere's attitude while they were working at a jobsite in August or early September 2001. Gensil testified Ruggere told him he was very unhappy with the company, and he was planning on leaving. Gensil testified he talked to Decker two times before Ruggere's discharge and told him he did not think Ruggere was happy. Gensil testified he also asked Franks if he noticed Ruggere's attitude was changing. Gensil testified he spoke to Franks because Ruggere was a good mechanic and Gensil did not want to see him leave. Gensil testified he did not notice performance problems with Ruggere because he did not work a lot of jobs with him.

⁵⁰ While Franks did not cite this a basis for Ruggere's discharge, Decker testified it is the responsibility of a lead person to notify the office when a member of his crew is going to be absent. Decker discovered Cook was absent about the Hilton Garden jobsite, but it was not called into the office. However, Decker also testified when an employee is absent it is Respondent's policy that the employee should call the office. When Decker asked Cook why he did not call the office, Cook responded he told Ruggere and that was all that was required. Decker told Cook this was not proper procedure and Cook was to call the office. Decker testified it happened again and Decker did not talk to Cook. Rather, he spoke to Franks about it. Decker also testified he thought Augen was also absent once or twice where Ruggere had not informed the office. Decker testified a crew leader was not required to call in an employee's absence if the employee had already notified the office. The crew leader would know the employee called in because the office notifies the crew leader of the call. Decker told Ruggere he was giving people improper instructions about calling in, and Ruggere said it would not happen again. Since it did happen again, Decker reported it to Franks. Respondent's written personnel policies direct the employee to call in sick to the office prior to their starting time. There is no mention in the policies the crew leader is required to also call in for the employee.

⁵¹ Ruggere testified although he had recommended Augen for employment, he learned through working with him he was unteachable, and Ruggere told this to Franks during their meeting at Springside. Ruggere testified Falandys recommended Cook for hire.

brought about due to performance problems with Ruggere. Nor do I credit their testimony that they each thereafter conducted multiple meetings with Ruggere in an effort to correct the alleged errors in his ways at Springside. When asked for a specific example of a problem at the Springside job, Decker could only describe an incident where ductwork had to be installed more than once in the dining room and corridors. Yet, he admitted this problem was not caused by Ruggere's work. Rather, it was a problem in the plans for the project. While Franks testified there were profit problems at Springside due to over runs in bid for man-hours, no financial records were placed into evidence to support Franks' assertions. His selecting Ruggere as the crew leader for the subsequent Hilton Garden project, the next large project, which was similar in nature to the work at Springside, but larger, further undercut Franks' claims.⁵²

Ruggere testified Hilton Garden was Respondent's next major project following the Springside. Ruggere testified Don Gensil and Phil Dotzel were the lead men at Hilton Garden when Respondent began working at this jobsite and before Ruggere arrived there. Ruggere credibly testified Gensil and Dotzel were the lead men at the site when ductwork was installed that was not properly weather proofed and that Ruggere had nothing to do with the installation of this ductwork, although the engineer complained about the installation, during the first week Ruggere was assigned to the jobsite. Ruggere testified very little of the wet ductwork had to be removed as a result of the problem. I have credited Ruggere's testimony over Franks and Decker's concerning who oversaw the installation of the ductwork noting Respondent called both Dotzel and Gensil as witnesses, but neither were questioned about the incident or otherwise claimed Ruggere was at fault. Ruggere worked on the Hilton Garden job for 7 or 8 months and he became the crew leader for the site when Dotzel and Gensil left.

Franks testified Ruggere was failing to bring his truck in for scheduled maintenance, and that he spoke to Ruggere about the problem. Ruggere in fact, admitted to missing a couple of appointments, but testified Franks never specifically criticized him for this conduct. Rather, he credibly testified this issue was brought up in shop meetings as a reminder for all of the men who drove company trucks not to miss scheduled appointments. Even Franks admitted Ruggere brought the truck in for makeup appointments for those he missed. Ruggere credibly testified his truck was an older vehicle with high mileage but that it ran well and it did not burn excessive amounts of oil. Franks testified Respondent had a maintenance file for the truck, which would show its mileage, as well as dates of maintenance service. Yet, no records for Ruggere's truck were introduced into evidence to support Franks' testimony that Ruggere had a problematic record concerning maintenance of his truck.

While Ruggere testified Decker would on occasion, tell him he did not call in enough, Ruggere credibly testified he contacted Decker on a daily basis, and more frequently if a problem occurred. I do not credit Decker's assertion Ruggere's communication at Springside was creating a problem with production, when in the face of his alleged misdeeds, Franks responded by assigning him to an even larger project. Ruggere testified the project manager, as opposed to the crew leader, sets the specifications for the vast majority of ductwork used in the field, which is then fabricated in Respondent's shop. Ruggere denied he discarded a large amount of ductwork he mismeasured. Ruggere testified, on occasion, there were problems with ductwork previously measured that would not fit. In those instances, they would get a change

⁵² Ruggere credibly denied telling anyone he wanted to do ceiling construction work and he denied telling Franks he wanted to be a firefighter. Ruggere testified he took a firefighter test in 1996 or 1997, failed it and that was the end of it. Ruggere testified he does some ceiling work on the side for friends, but he is a novice at installing ceilings and he would not make a career change to perform this work.

order, and if it was not a common size they would discard it at the dumpster at the jobsite because there was no possibility of using it elsewhere. Ruggere did not recall Franks or Decker ever complaining to him about discarded ductwork. Ruggere testified he could make minor changes at the jobsite, but he would never make major changes without someone's consent.

5 Ruggere testified he had a tablet where he listed the order of his future fabrication needs, which he provided to the shop almost every morning when he came to work.

10 Ruggere credibly testified that he did not take a first aid kit or rain gear at the November 2001 shop safety meeting because he did not wear rain gear, and he already had a first aid kit in his truck. Ruggere testified the items were left on a table as if they were complimentary if the employees needed them.⁵³ Ruggere testified he did not think the first aid kit was different from the one he had, stating, "I didn't think of it as a big deal." Ruggere testified he was not trying to send a message by not taking the items.

15 Ruggere credibly testified he had no basis to conclude either Franks or Decker were having problems with his work, and Respondent's actions in terms of his November 2001 wage increase and his Hillside Garden assignment bare out his testimony. Concerning the safety meeting, which Franks contends was the final thread leading to Ruggere's discharge, the evidence reveals the meeting was conducted at the end of the day and there were not sufficient
20 chairs in the shop for employees to be seated. Ruggere, according to Phil Dotzel, assumed his customary position during the meeting by leaning against one of Respondent's machines. Respondent witnesses Franks, Phil Dotzel, and Don Gensil testified Ruggere was not paying attention at the meeting. Franks and Phil Dotzel testified Ruggere had his head down and was looking at the floor. Franks testified Ruggere's crew members Cook and Murdock assumed
25 similar postures. Don Gensil testified Makowski and Falandys were also not paying attention during the meeting. I view it as more than coincidence that Respondent's witnesses named five of the six employees who attended the initial union meeting as not paying proper attention at the shop meeting. I also do not believe Franks was overly concerned about Ruggere's failure to take rain gear or the safety kit at the meeting. Franks testified the failure to take the rain gear
30 was not as critical as his failure to take the safety kit, which he contended was an OSHA requirement in that the employees' old kits had an expiration date. However, Ruggere's credited testimony reveals these items were merely laid on a table at the meeting, and there was no contention the employees were told the first aid kits they were previously issued were time sensitive. While Franks testified he had made a preliminary decision to discharge Ruggere
35 at this meeting, he also testified he waited a week or two think it over before he finalized the decision. Yet, subsequent to the meeting, Ruggere was never told that he needed to replace his old first aid kit as an OSHA requirement. Rather, Franks testified that, at the meeting, he realized people were starting to follow Ruggere with his "attitude" and performance requiring Ruggere's discharge. I have concluded Franks repeated reference to Ruggere's attitude was in
40 fact a reference to his union activity, which was the cause of his termination, and that other reasons advanced by the employer were mere pretext. I find that Respondent discharged Ruggere on December 3, 2001, in violation of Section 8(a)(1) and (3) of the Act.

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50 ⁵³ I do not credit Franks' testimony that he specifically instructed the crew leaders during this meeting that they had to take the first aid kits. Franks' testimony on this issue appeared to be an afterthought, and Ruggere credibly testified that he thought the items that were distributed during the meeting were complimentary.

2. The April 16 layoff of Falandys and Makowski

Falandys began working for Respondent in 1989, and at the time of his layoff he was the shop foreman in charge of fabrication for Respondent's fieldwork. Falandys ran a machine called the Vulcan plasma cutter which was a computer based mechanism used to cut fittings for the ductwork. Makowski served as Falandys' shop assistant and fabricated straight ductwork by hand. Makowski began working for Respondent in 1996. Each, prior to their working in the shop, performed and remained qualified to perform field installation work for Respondent. Falandys received lists from the project manager designating the fabrication needed for each project. He also received frequent calls from the field employees informing him of additional fabrication needs for projects they were working on. When Falandys and Makowski were caught up in their fabrication work for ongoing projects, Falandys would perform fabrication for future stock, or they did odd jobs around the shop.

Falandys and Makowski attended the union meetings at Ruggere's home on October 16, November 20, and December 20, 2001. They each spoke to other employees in favor of the union. Within the two week period following Ruggere's discharge, they were each called into Franks' office twice during which Franks criticized Union Organizer Andes concerning his tactics and committed the series of Section 8(a)(1) violations found above, including accusing Falandys of being a union organizer, and threatening to close Respondent's operations if it went union. Franks admitted that shortly after Ruggere's discharge he was informed that Falandys and Makowski attended union meetings. I have also found that Franks made remarks violative of Section 8(a)(1) of the Act to these two employees during meetings in March and April 2002.

On April 8, Falandys, Makowski, Murdock signed union authorization cards at a meeting conducted by Andes at Ruggere's home. It was discussed at the meeting that the following Monday, Andes would turn in a letter to Franks naming the three card signers as union organizers. However, on April 12, Franks laid off Murdock, Krupinski, and Switzer due to lack of work. As a result of his layoff, Murdock contacted Andes and stated he did not want to be named as a union organizer to Franks for fear he would lose the privilege of performing side work at Respondent's facility. A union meeting was held at Murdock's home, with Andes, Ruggere, Falandys and Makowski in attendance on April 15. Murdock was drinking and disruptive during the meeting. Following the meeting, Murdock phoned Andes and told him that Murdock was going to call Franks and tell him the employees were organizing.

On Tuesday morning, April 16, at the start of the workday, Murdock, who was dressed in street clothes, let S. Franks into the shop. S. Franks summoned Falandys and Makowski in the office and told them they were being laid off for lack of work. She took their cell phones and keys. As they were leaving they saw Decker in the parking lot and they informed him they were being laid off. Decker stated S. Franks must be crazy in that he had just given them a fabrication list the day before with 2 weeks worth of work. Falandys testified the list was for one project in that it was stapled together. Falandys admitted his worked was slow during the 6 weeks before the layoff in that he was making stock for future projects, performing fabrication work based on requests from the field, and performing such non fabrication work as painting and making shelves.

I have concluded the General Counsel has made a prima facie case under the Board's *Wright Line*, supra, requirements of discriminatory layoff concerning Falandys and Makowski. Franks was aware of their prior attendance at union meetings and committed multiple violations of Section 8(a)(1) of the Act concerning comments he made to these two employees. Moreover, there is timing, in that they were laid off 8 days after they signed a union card, and the day after Murdock threatened to disclose that information to Franks. Based on the total

circumstances here, I have concluded Murdock did follow through on his threat to inform Franks on the evening of April 15 of Falandys and Makowski's plans to organize Respondent's employees. This conclusion is bolstered by Murdock's unexplained appearance at Respondent's shop on the morning of April 16, his letting S. Franks into the shop shortly before she laid off the two employees, although Murdock had been laid off on April 12.

Since I have found the General Counsel has made out a prima facie case the burden shifts to Respondent to establish it would have laid off Falandys and Makowski absent their union activities. I have concluded Respondent has failed to meet this burden. While Falandys testified Respondent had records that would show what he did on an hourly basis in the shop, none of these records were introduced into evidence to show what shop work was performed immediately before or after the layoff. Thus, Respondent relied mainly on the testimony of Franks and to a less extent Decker to justify the layoff.

Franks testimony shifted as to the reasons for the layoff throughout the course of the hearing. On November 14, Franks testified that Falandys and Makowski were not laid off on April 12, along with the three other employees, because Respondent had several projects getting ready to start that required fabrication work. However, on November 15, Franks again appeared on the stand and his testimony changed. He now described multiple projects for which Respondent's fabrication work was complete. Franks then testified the only project remaining at the time of the April 12 layoff in need of fabrication work was the Back Mountain Harvest Assembly project (the Back Mountain project). Franks testified he was unable to reach the construction manager for the Back Mountain project Lynn Kesselman, on April 12, before Franks left town on Sunday April 14, on a golf trip to Williamsburg, Virginia. Kesselman worked for Sordoni Construction, the general contractor for the project. Franks testified he phoned Kesselman on April 15 from Williamsburg, and was told there was a cease and desist order on the Back Mountain project issued by the Kingston Township Zoning Board. Franks testified that, based on this information, he concluded he had no work for Falandys and Makowski and he determined it was necessary to lay them off. Franks phoned S. Franks the evening of April 15, and asked her to layoff Falandys and Makowski the following day. Yet, when Franks appeared on the stand on December 9, shortly before Kesselman testified, Franks' testimony changed again. Franks testified that he had previously testified, "that on April 15th, I had a conversation with Sordoni Construction, where we were under a cease and desist order from the Kingston Township Zoning Board, that was not correct." Franks now testified that he did have a conversation with Kesselman on April 15, but Kesselman did not mention a cease and desist order. Kesselman just stated the project was running behind and there was no reason for Respondent to perform any fabrication work at that time. Franks testified Kesselman stated the fabrication work would not be needed for several months. Franks testified this information necessitated Falandys and Makowski's layoff. These continual shifts in Franks' testimony lead to the conclusion that he was making things up as he went along. He impressed me as an intelligent individual who should have had a better recollection as to the details causing him to layoff Falandys and Makowski.

Kesselman was called as a witness for the General Counsel, and his testimony did not support either of Franks' accounts. Kesselman and former Township of Kingston Zoning Board employee Benjamin Gorey testified the township did not issue a cease and desist order for the Back Mountain project until May 28. Thus, the cease and desist order had nothing to do with Franks' decision to layoff Falandys and Makowski on April 16, as Franks initially testified. Moreover, Kesselman credibly testified he spoke to Franks a few days before Franks went on his golf trip, because Franks told him he was getting ready for the trip, and wanted to touch base with Kesselman before Franks left town. He testified he had only one conversation with Franks where Franks mentioned the golf trip. Thus, I have concluded, contrary to Franks'

testimony, that Kesselman gave Franks whatever information he had to impart about the Back Mountain project on or before Friday April 12, the day Franks elected to layoff the first three employees. I have concluded that Franks decided not to layoff Falandys and Makowski at the time, and that the only intervening event of significance was on April 15, when Murdock
5 informed Franks that the Falandys and Makowski had signed union cards on April 8.

The conclusion that Franks had work for Falandys and Makowski, at the time of their layoff, is buttressed by the fact that Franks recalled field installer Switzer from layoff on April 29,⁵⁴ and hired Gary Gensil on May 9. While Gary Gensil, was ostensibly hired as a project
10 manager, he was hourly paid, as opposed to Decker, who was salaried. In this regard, Franks testified that, during the period of April 15 to Falandys' May 13 recall, there was fabrication work performed in the shop. Franks testified Gary Gensil did some of the work in that he was learning how to operate the plasma cutter, which had previously been operated by Falandys before his layoff. While Franks testified Gary Gensil was learning to operate the plasma cutter,
15 Falandys' credited testimony reveals that for the 2 days of Falandys' recall beginning on May 13, Gensil was operating the machine 3 to 4 hours a day, and was performing Falandys old job, whereas Falandys did not operate machine at all.⁵⁵ Falandys' testimony reveals that former Project Manager Suda, who Gensil was supposed to have replaced, did not operate the machine. Rather, Suda just inputted software updates into the machine's computer. Yet,
20 Franks testified Gensil was doing 6 to 8 hours a week of fabrication work during Falandys' layoff, and that former field employee Switzer was performing 2 to 3 days a week of fabrication work in the shop while Falandys was on layoff status. Moreover, Decker also testified he performed some fabrication work during Falandys and Makowski's layoff.

Both Falandys and Makowski were qualified as field installers. Yet, Franks recalled recently rehired Switzer prior to the two discriminatees, although Switzer could not operate the plasma cutter and thus, by Franks own testimony was much less efficient performing the needed fabrication work than Falandys would have been. Moreover, although Franks claimed he wanted Gensil to learn to operate the plasma cutter, Falandys was clearly the only qualified
30 individual to teach him. Yet, Switzer was recalled 2 weeks earlier than Falandys. Both Falandys and Makowski also credibly testified there was other work they could have performed in the shop during their layoff period. I have concluded for the reasons stated that Respondent has failed to establish it would have laid off Falandys or Makowski absent their union activity. This conclusion is supported by Franks' statements to these employees, during a meeting on
35 April 22, when Falandys confirmed to Franks that Falandys had signed a union card. Franks called him a back stabber and a bastard and labeled him as "Brutus". Franks told Falandys and Makowski that they would not work there again over his dead body. Franks shifting testimony as to the reasons for their layoff, in addition to fabrication work being performed in the shop while shop employees Falandys and Makowski were laid off supports the conclusion that the reasons advanced for their layoffs were pretextual. Accordingly, I find Respondent laid off
40 Falandys and Makowski on April 16, in violation of Section 8(a)(1) and (3) of the Act.

⁵⁴ Switzer, who had previously worked for Respondent, was hired on December 20, 2001.

⁵⁵ Similarly, Makowski testified that, during his brief recall in June, he heard machines operating in the shop, which are used for fabrication, but he was not assigned this work.

3. The recalls of Falandys and Makowski

a. *Legal principles*

5 In *Krist Oil Co.*, 328 NLRB 825, 825 (1999), the Board held an offer of reinstatement made to discriminatee Mains did not toll Mains' backpay because the offer was not made in good faith. The Board set forth the following principles concerning offers of reinstatement for discriminatees:

10 It is well established that an employer that has unlawfully discharged an employee may satisfy its obligation to reinstate the employee and may toll its backpay liability by offering reinstatement, provided that the offer is firm, clear, specific, and unconditional. A facially valid offer of reinstatement will be found invalid (and thus will not satisfy the employer's reinstatement obligation or toll its backpay liability) where--as with Mains in
15 this case--following the employee's acceptance of the offer, the employer imposes undue, onerous, or unlawful conditions of employment on the reinstated employee. ...Further, an unlawfully discharged employee is privileged to reject an offer of reinstatement, and preserve his ongoing entitlement to reinstatement and backpay, where he has a reasonable fear of further discrimination against him. (Citations omitted.)

20 In *Rainbow Coaches*, 280 NLRB 166, 184, (1986), *enfd.* as modified 835 F.2d 1436 (9th Cir. 1987), *cert. denied* 487 U.S. 1235 (1988), the following principles were quoted with approval from the Board's decision in *Sumco Mfg. Co.*, 267 NLRB 253, 258 (1983):

25 [A]n offer of reinstatement to a job which is not substantially equivalent to that held prior to the discrimination does not toll backpay even when, as here, the employee accepts the offer, if that employee subsequently quits because of dissatisfaction with the inadequate reinstatement.

b. *Falandys May 13 recall to work*

30 The unfair labor practice charge over Falandys' April 16 layoff was filed on April 22. On May 12, Franks phoned Falandys stating Franks had work for him and Franks set up a meeting for Monday, May 13, at 8 a.m. in Franks' office. Falandys normal start time was 7 a.m.
35 Falandys met Franks as scheduled. Falandys credibly testified the conversation went as follows: Falandys said he must be looking at a dead man because Franks had told him that he would never work there again, except over Franks' dead body. Franks said his lawyer told him to hire Falandys back. Franks said you are here but you are not here. Franks asked Falandys if he was a union organizer and Falandys said he was. Franks asked why he had not been told this, and Falandys said he thought Andes would be delivering a letter later that afternoon.
40 Franks said Falandys would be taking his orders from Gary Gensil, a new project manager. Falandys asked why Franks had canceled his health insurance on May 1. Franks said he thought Falandys was covered by the Union, and he did not want to pay double. Franks said Falandys should watch what he said to the other men he came across during the day. Franks
45 said a lot of people want to wring your neck for what you have done. Franks said good luck in organizing this company because the men think you are trying to take their jobs from them.⁵⁶

50 ⁵⁶ The parties stipulated that on May 13, 2002, Andes hand delivered a letter on Local 44 stationary addressed to Franks designating Falandys as a union organizer.

I find Franks' statement to Falandys that you are here but you are not here, following Franks' prior statements that he would only bring Falandys back over Franks' dead body, and that Franks lawyer told him to hire Falandys back constitutes a threat of future reprisal and diminished job status due to Falandys union activities and is coercive and violative of Section 8(a)(1) of the Act. See *Sheraton Hotel Waterbury*, 312 NLRB 304, 316 (1993), enfd. in pertinent part 31 F.3d 79 (2nd Cir. 1994), ("You better watch out, you're one of the ten on the list.") I also find Franks violated Section 8(a)(1) of the Act when he told Falandys a lot of people want to wring your neck for what you have done. In the context of Franks other unlawful statements directed towards Falandys, Franks' statement was coercive because it suggests Franks condoned physical violence against Falandys because of his union activities. I find that Franks asking Falandys whether he was a union organizer was a coercive interrogation in violation of Section 8(a)(1) of the Act. As the Board directed in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), I am required to consider the totality of the circumstances surrounding the questioning. Falandys credited testimony reveals that while, Andes, as stipulated by the parties, delivered to Franks a letter designating Falandys as an organizer on May 13, Franks had not received the letter at the time of his 8 a.m. meeting with Falandys. The question of whether Falandys was at the time of the conversation an open union supporter is debatable. He had previously disclosed to Franks that he signed a union card, however, this was as a result of what I have concluded was a prior unlawful interrogation. The Union had also filed an unfair labor practice charge on Falandys' behalf on April 22, again as a result of what I have concluded was Respondent's unlawful conduct against him. However, regardless of whether it is concluded Falandys was an open union supporter at the time of his conversation with Franks, I find that Franks, the owner of the company, had required Falandys to meet in Franks' office as part of the recall process. I find that during this conversation, in which Franks questioned Falandys as to whether he was a union organizer, Franks issued threats to Falandys in violation of Section 8(a)(1) of the Act. Accordingly, I find Franks interrogation of Falandys to be coercive and violative of Section 8(a)(1) of the Act.

Following his meeting with Franks, Falandys reported to work in the shop. Falandys credibly testified to the following: Gary Gensil left the shop for a couple of hours. During this time, employee Dean Miller came through the shop around 10 to 11 a.m. Miller walked into the office and a short time later he returned to the shop. Miller said to Falandys what the hell are you doing here. Falandys said he was there to organize Respondent. Miller said we do not want your kind here. Falandys said he was there to do what he had to do. If you are not interested that is fine. Miller became loud and as he was walking away said "I should take you out in the parking lot and kick your ass." Miller said "because we don't want your kind here." Miller got closer toward the door and said do not think I am afraid of you. I will take you out in the parking lot and kick your ass right now. Falandys said if that is what you want to do, come and get me, I am right here. Miller said "I'll get you" a couple of more times and then left.

Falandys credibly testified that: As soon as Miller, left Falandys went to the office and told Franks that Miller had threatened him by stating he wanted to take Falandys out to the parking lot and kick his ass, that Falandys kind was not wanted there, and that he should get the hell out while he could. Falandys told Franks he wanted him to do something about it. Franks responded, "I can't help you and I won't help you." Falandys told Franks this man is on your time, you are paying him and you are responsible for him. Franks repeated that he could not and would not help Falandys.⁵⁷

⁵⁷ Falandys testified he is 6 feet 2 inches tall, weighs 175 pounds, and is 41 years old. Miller testified he is 5 feet 9 inches tall, weighs 225 pounds, and is 31 years old.

Falandys credited testimony reveals: On May 14, Falandys was alone in the shop again for around 3 hours. Miller came in the shop and hung around for an hour. He walked by Falandys close enough to brush up against him and muttered things under his breath. Falandys ignored him and kept working. A few of the other men came into the shop, but would not
 5 acknowledge Falandys when he attempted to strike up a conversation. Falandys testified the men who would not talk to him were Phil Dotzel, Donny Gensil, and Nick Dotzel.⁵⁸ Falandys testified it is dangerous to work alone in the shop with the machines, particularly with Miller threatening him. As a result, Falandys told Franks he could not control his employees, especially Miller, that Falandys was being isolated, felt it was unsafe and could no longer work
 10 there. Falandys testified Miller was hanging around the shop even while Falandys told Franks he was quitting. Falandys testified Franks never told Falandys he would look into the May 13, incident where Miller threatened Falandys.

Franks testified as follows concerning Falandys recall: Falandys met with Franks at 8
 15 a.m. on May 13, and then Falandys started working. Between 10 and 11 a.m., Falandys came into Franks' office and said Miller had threatened him. Franks asked Falandys what he wanted Franks to do. Falandys said it was Franks' responsibility to provide him a safe work place. Franks responded you are probably right and Franks would do every thing he could to make sure Falandys had a safe work place. Falandys told Franks that Miller said he had wanted to
 20 take Falandys outside and kick his ass. Franks told Falandys he was going to talk to Miller. When Falandys left his office, Franks called Miller on the Respondent's two way phone system and told Miller to go about his business, and to leave Falandys alone. Franks informed Miller of Falandys' accusation about Miller wanting to take Falandys outside and kick his ass. However, Miller responded that was not what he said. Rather, Miller said he told Falandys some day we
 25 are just going to meet outside. Franks told Miller we do not need this and to stop. Franks testified Falandys and Miller had a chance meeting in the shop, since Miller is Respondent's piping superintendent and Respondent did not stock pipe or fittings for Miller's type of work in the shop, so most of the time he was not there. Franks testified Miller would come in to the shop in the morning and at night and that was it. Franks testified neither Miller nor Falandys
 30 informed Franks what the argument was about.

Miller testified he came into the shop the morning of May 13 in that he reports to the shop before leaving to go to his jobsite.⁵⁹ Miller testified he saw Falandys and asked him what he was doing there. Falandys said he was a union organizer. Miller told Falandys before this is
 35 over you and I are going to go outside. Falandys said anytime you are ready pal. Miller told Falandys he was not afraid of him and then left. Miller admitted he challenged Falandys to a fight. Following his conversation with Falandys, Miller went outside to his truck and came back inside to drop paperwork in the office and then he left. Miller testified he was there for 5

40 ⁵⁸ Philip Dotzel testified that during the day or two Falandys was recalled to the shop, he saw him in the shop but did not talk to him. He testified there was no need to talk to him. Phil Dotzel testified he was upset with Falandys and Makowski in that he did not believe in what they were doing concerning the Union. He testified, "They were putting my job in jeopardy." Phil Dotzel testified if Respondent went union, he did not think he would have a job there since he
 45 did not want to work union and would therefore have to find another job. Don Gensil testified he saw Falandys but did not speak to Falandys the two days of Falandys recall. Don Gensil testified his failure to speak with Falandys had nothing to do with Falandys' association with the Union. He testified he had no reason to speak to Falandys at the time. Rather, he just went in did what he had to do and left. Don Gensil testified he knew Falandys was involved with the
 50 Union. Don Gensil testified the Union was not for him.

⁵⁹ Miller testified he also returns to the shop at the end of the day to check in.

minutes. Miller testified he saw Falandys in the office talking to Franks when he came in to drop off the paperwork. Miller left in his truck and received a call from Franks on the two way radio. Franks told him to knock it off, to stay apart and not do what he was doing concerning Falandys.

5 Miller testified he saw Falandys the next day at work, but Miller did not look at him or say anything to him. Miller came in the morning like he always did, and then left. Miller testified he was opposed to the Union, "Cause I didn't want to lose my job." Miller explained that he heard from people in the Union if the company went union, then the company would only do sheet metal work, and since Miller does piping work, he thought he would have to switch to sheet
10 metal work or lose his job. Miller did not want to perform sheet metal work. Miller testified he was in the shop for around 10 minutes on May 14. He arrived and around 7:10 a.m. and left around 7:20 a.m. Miller testified he does not check into the shop every day. He testified the trucks stay at the shop, so he came in to get the work truck and then went out.

15 Franks testified on May 14, Falandys reported to work, and worked that morning. In the afternoon, Falandys came into Franks' office and said he could no longer work under these conditions. Falandys said no one will talk to him, and the only employee who talked to him threatened him. Franks said he did not know what he could do about it, that he had taken care of the threat issue. Falandys said he was quitting and left. Franks testified he did not know
20 whether Miller was in shop on May 14, or was working around the shop. Franks testified Miller would have had no reason to be in the shop May 14, and on May 13, he first day he probably just passed through.

I have credited Falandys' testimony concerning the events surrounding his recall over
25 that of Franks and Miller. Falandys testified on May 13, Miller came into the shop around 10 or 11 a.m., Miller went into the office then he returned to the shop at which point Miller threatened Falandys. Falandys testified he went into Franks' office to report the threat immediately after his conversation with Miller. Franks confirmed Falandys' testimony that Falandys reported the incident at around 10 or 11 a.m. Miller admitted to challenging Falandys to a fight, and he
30 admitted seeing Falandys reporting the incident to Franks shortly after it ended. Yet, both Franks and Miller testified that in the normal course of his duties Miller would only come into the shop early in the morning before reporting to the jobsite and at the end of the day. Thus, Miller's appearance in the shop at mid-morning on May 13, is unexplained by the testimony of Respondent's witnesses. This lends credence to Falandys' testimony that Franks cautioned
35 Falandys shortly before the incident that a lot of people wanted to wring Falandys neck for what he had done, and that the men think Falandys was trying to take their jobs away by trying to organize the company.⁶⁰ Taking into account the content of their testimony and the witnesses' demeanor, I have credited Falandys over Franks and Miller's accounts of these events.

40 Before Falandys' layoff, as shop foreman, Falandys ran the Vulcan plasma cutter, which cut duct for fittings assembly and then Falandys assembled the fittings. Falandys testified,

60 I do not find it mere coincidence that Miller and Phil Dotzel each testified they thought they would lose their jobs if Local 44 was successful in its campaign. Moreover, given Franks' statements to Falandys and Makowski that they could be replaced with temporary employees,
45 his threat to close if Respondent went union, as well as his informing Falandys that a lot of employees wanted to wring Falandys' neck and that they thought he wanted to take their jobs, I do not credit Miller and Phil Dotzel's claims that their fear of job loss were not generated by statements by Franks. This is particularly so in view of Franks' testimony that he met with all of
50 Respondent's employees shortly after Ruggere's discharge, and that he showed more than one employee the letter from the temporary employment agency.

following his recall, Falandys did not operate the plasma cutter. Rather, Gary Gensil ran the plasma cutter 3 to 4 hours a day.⁶¹ Falandys also testified Gensil gave Falandys his assignments, although the project manager would not normally give him his assignments. Falandys testified, following his recall, Falandys performed Makowski's job of shop assistant making straight ductwork. As shop foreman, if a delivery came in or a phone call came in that someone needed some ductwork from the field, Falandys would take care of it. However, when Falandys returned to work Gensil was performing this work.

In sum, on May 13, following his discriminatory layoff, Falandys met with Franks. During this meeting, Franks committed certain violations of Section 8(a)(1) of the Act by telling Falandys Franks' lawyer told him to hire Falandys back, that there he was there but not there, by interrogating him about his union activities, and stating that a lot of the employees wanted to wring his neck because of what he had done, and they thought he was trying to take their jobs by trying to organize the company. Thereafter, Falandys returned to work in the shop as shop assistant while Gary Gensil performed Falandys' former duties as shop foreman. Miller came into the shop mid-morning on May 13, and physically threatened Falandys. When Falandys reported the incident to Franks, Franks condoned Miller's conduct by stating, "I can't help you and I won't help you."⁶² I find that Respondent did not make a good faith offer of reinstatement to his former to Falandys on May 13, sufficient to toll Falandys' backpay or reinstatement rights under the Act resulting from Falandys discriminatory layoff on April 16. See, *Krist Oil Co.*, supra at 825; and *Rainbow Coaches*, supra at 184.

c. Makowski's June 3, recall to work

Franks contacted Makowski by phone in May and said he would like him to come back to work.⁶³ Franks asked Makowski if he was going to be a union organizer. Makowski testified he said he did not know. Franks testified that, during this call, Franks asked Makowski if he was going to come back to work and have affiliations with the Union. Makowski said yes. Franks testified he said that was fine with him, but Franks suggested to Makowski that he talk to Falandys first, "because Mark had some problems and some issues, and I said I wouldn't want you to walk into something, you know, caused by some other employees or whatever, that I have nothing to do with. And I just think that you should talk to Mark before you come back."⁶⁴

⁶¹ Franks testified, during Falandys' recall, Gary Gensil was learning the input side of the plasma cutter in that Gensil was inputting fabrication specifications into the machine.

⁶² Falandys credibly testified that Franks never told Falandys he would look into the incident with Miller. I have not credited Franks and Miller's claims that Franks spoke to Miller immediately after receiving the report that Miller threatened Falandys and ordered Miller to desist in such behavior. In this regard, Franks never reported this conversation to Falandys, and I have credited Falandys' testimony that Miller was in the shop the next day for a substantial period of time, and that he was continuing to engage in threatening behavior towards Falandys.

⁶³ The following findings are based on the credited testimony of Makowski, as supplemented and corroborated by Andes, as well as admissions by Franks.

⁶⁴ When asked what issues Falandys had, Franks testified, "I think we went over those already, where Dean Miller had threatened him, where he said that no one talked to him and he couldn't stand working there anymore, and he lasted 15 hours and walked out the door and quit." Yet, Franks went on to state he was not told Miller threatened Falandys concerning the Union, stating he only knew Miller and Falandys "got into some conversation...". He testified he assumed the confrontation between Miller and Falandys was about the Union "because all of the people in the company knew that he was involved with the Union and we were not a Union company."

Makowski told Franks that he was working another job, and he had to give two weeks notice, and then he would return to work for Franks.⁶⁵ Franks agreed and told Makowski to report to the office at 8 a.m. when he returned.

5 Makowski met Franks in his office on June 3. No one else was present. Franks said there was no work in the shop, and Makowski would be going out to a jobsite to work. Makowski said this was fine. Franks told Makowski to report to the Hilton Garden jobsite. Makowski drove his own vehicle to the site. Phil Dotzel and Murdock were at the site, and Dotzel gave Makowski the assignment of cutting plastic off insulated ductwork. Makowski asked Phil Dotzel if there was any ductwork to be hung, and Dotzel said no. Dotzel and Murdock had driven to the site together in a company truck.⁶⁶ The following day, Makowski arrived at the Hilton Garden jobsite at 7 a.m., the starting time given to him by Phil Dotzel. Makowski drove himself, while Murdock and Dotzel went by company vehicle. Makowski testified his driving by himself to the site was contrary to company procedure because the crew usually meets at the shop before going to a jobsite then drives together in a company truck.⁶⁷ Makowski again asked Phil Dotzel if there was any ductwork to be hung. He said there was none and Makowski should continue cutting plastic off the ductwork. Makowski testified the removal of plastic from ductwork is normally assigned at the very end of the job, but this job was only 50 to 70 percent complete.

20 Makowski called Andes, during his 10 a.m. break on June 4, and told Andes he was isolated, the remainder of the crew was hanging ductwork in front of the building while Makowski was inside and they would not let him hang ductwork. Makowski asked Andes what he wanted Makowski to do.⁶⁸ After speaking to Andes, Makowski called Franks and said he wanted a raise. Makowski told Franks that he was isolated from other workers, he was cutting plastic off ductwork and since he was not doing his normal duties he wanted to be paid union

30 ⁶⁵ At the time of Franks' call, Makowski was working for a Local 44 contractor performing work at Waymart Prison. Makowski was being paid \$19.97 per hour. Makowski only worked for Respondent for 2 days after he was recalled. He testified he returned to the prison job after he stopped working for Respondent. Respondent argues at page 46 of its post-hearing brief that Makowski testified when he left the job at Waymart Prison to return to work for Respondent he told his interim employer at the prison that he would only be gone for 2 days. However, it is clear that Makowski credibly corrected his initial response, when he testified, "I told them I was not sure when I would be back." Makowski testified he told the interim employer he would be out for some time due to a situation he was involved in. Given Franks' interrogation of Makowski and Franks' reference to Falandys discriminatory treatment during his short lived reinstatement in Franks' phone call to Makowski, I do not find Makowski's informing his interim employer that he might return to work there demonstrates that Makowski had an improper motive for returning to work at Respondent as Respondent contends in its brief. Rather, I have concluded that Makowski was aware of Respondent's course of discriminatory conduct, and that there was a likelihood that this conduct would continue against Makowski when he returned to work at Respondent.

45 ⁶⁶ It was stipulated that on June 3, 2002, Andes hand delivered a letter addressed to Franks designating Makowski as a union organizer.

⁶⁷ Makowski conceded that he lived closer to the jobsite then he did to Respondent's facility and that he would have to have to driven past the jobsite to get to Respondent's facility.

50 ⁶⁸ Makowski testified Andes had called Makowski on Sunday, June 2, and told him to call Andes during his break on Tuesday, June 4, to tell Andes the work he was performing, and to learn what Andes thought Makowski should do about his working conditions.

scale.⁶⁹ Franks said he would get back to him at a later time because he was busy. Then Makowski called Andes again and he told Makowski to meet him at Respondent's facility and they would go on an unfair labor practice strike against Franks. Andes said he was going to give Makowski a union scale sheet and Makowski should go in and ask Franks to pay him union scale. Makowski returned to the shop to meet Andes. Makowski talked to Andes again before he went into Respondent's facility. Andes told him to give Franks a letter stating Makowski was a union organizer, and if Franks would not pay Makowski union scale, Makowski would go on an unfair labor practice strike.⁷⁰

After meeting with Andes, Makowski met with Franks in his office. No one else was present. Makowski told Franks he would like to get paid union scale and handed Franks the union scale sheet calling for the journeyman's rate of \$20.77 an hour. Makowski told Franks such a wage increase was justified due to his changed working conditions since he was not working in the shop, and he was at a jobsite where he had been cutting plastic off ductwork and isolated from the other employees. Franks responded Makowski was not worth that much money. Makowski handed Franks the letter stating Makowski was going on an unfair labor practice strike. Franks told him to do what he had to do.⁷¹ Andes and Makowski picketed Respondent's facility from about 11 a.m. to about 2 p.m. on June 4. Andes testified that they each had picket signs. One said, "Climatep Air Conditioning On Strike for Unfair Working Conditions." At the bottom of the sign it said Sheet Metal Workers' Local 44. The other sign said, "Climatep Air Conditioning Discriminates Against Employees, Sheet Metal Workers' Local 44." Franks testified he saw Makowski, Andes, and a Mr. Johnson of the Insulator's Union picketing on Respondent's sidewalk until about 2:30 p.m. on June 4.⁷²

⁶⁹ Makowski testified being paid union scale would have given him about a \$10 an hour raise in that he was earning \$9.60 an hour prior to his layoff.

⁷⁰ Franks testified, around 10 a.m. on June 4, Makowski called Franks and said the other members of the crew were installing ductwork, and all Makowski was doing was removing plastic. Franks said removing plastic was part of the work. Makowski said they are installing ductwork, and Makowski wanted to install it. Franks said to give him an hour and he would try to get to the jobsite to get the situation straightened out. Makowski said okay and hung up the phone. Franks testified around 10 minutes later Phil Dotzel called Franks and asked if Franks was supposed to come to the jobsite to meet Makowski. Franks testified Phil Dotzel told Franks not to bother because Makowski had left. Franks' testimony undercuts that of Respondent witness Philip Dotzel, who testified Makowski did not tell him he was unhappy with the assignment of removing plastic from ductwork. It is evident that Phil Dotzel knew of Makowski's complaint or he would have had no reason to call Franks to tell him it was not necessary for him to come to the jobsite.

⁷¹ Makowski testified the other reason he went on strike was there was work going on in the shop, yet Makowski was not allowed to work there for the day and one half he returned. Makowski testified he heard people using machines to fabricate metal in the shop, when he was meeting with Franks on Monday morning at 8 a.m. on June 3. Makowski also saw Gary Gensil and Bob Switzer's cars in the parking lot at times during the day, which would indicate they were working in the shop. Before his layoff, during the last 5 years of his employment, Makowski was a helper performing fabrication work in the shop.

⁷² I do not credit Franks' testimony, in the face of Makowski's denial, that on June 4, Franks asked Makowski if anyone treated him unfairly while he was back, and Makowski said no, or that Franks asked Makowski if anyone had asked him to do something he had not done before and Makowski again said no.

1. Analysis

Franks contacted Makowski by phone in May and said he would like him to come back to work. Franks testified that Franks asked Makowski if he was going to come back to work and have affiliations with the Union. Franks testified Makowski said yes. Franks testified he said was fine with him, but Franks suggested to Makowski that he talk to Falandys first, "because Mark had some problems and some issues, and I said I wouldn't want you to walk into something, you know, caused by some other employees or whatever, that I have nothing to do with. And I just think that you should talk to Mark before you come back." Franks had been the recipient of an unfair labor practice charge filed the by Union over Makowski's prior layoff at the time of this conversation. Moreover, Franks was previously aware of Makowski's pro-union leanings based on Franks' prior unlawful interrogation, and information provided by other employees. Based upon the way in which Franks received his information on Makowski's status, I do not find that it was on the basis that Makowski voluntarily disclosed he was an open union supporter at the time of their May phone conversation. Moreover, I find Franks' question to be coercive in the context that Franks had committed numerous other unfair labor practices, and Franks cautioned Makowski, during the phone call, to give up his organizing activities or face an unsafe work environment, a fate that had recently befallen Makowski's co-worker Falandys because of Falandys' support of the Union. I therefore find Franks coercively interrogated Makowski in violation of Section 8(a)(1) of the Act during the May phone call.

I have concluded that Respondent failed to make a good faith offer of reinstatement to Makowski when he was recalled on June 3. As set forth above, Franks violated Section 8(a)(1) of the Act by interrogating him as to his union activity, and then referred him to what happened to Falandys, who had previously attempted to return to work as a voluntary organizer for the Union. I have concluded that Franks' remarks constituted a veiled threat to Makowski that he would not be provided a safe work place if he persisted in his union activities. Thereafter, when he reported to work, Makowski was assigned as a field installer, rather than his former position in the shop although he could detect that fabrication work was being performed in the shop. He was then given assignments in the field that served to isolate him from other employees, despite Makowski's repeated protests. Respondent also had Makowski, contrary to its regular procedures, drive directly to the jobsite rather than commute there with his crew. While Makowski lived closer to the jobsite than Respondent's shop, in the context of Franks' interrogation and warning, and the isolated nature of his assignments at the jobsite, I have concluded that he could reasonably view his solo commute as part of Respondent's efforts to isolate him from its other employees. I have concluded that Respondent failed to reinstate Makowski to his former position, and that Franks' remarks and the terms of the reinstatement reveal that it was not made in good faith. Accordingly, I find that Respondent's offer of reinstatement Makowski did not toll his backpay following his unlawful layoff on April 16, or otherwise serve to vitiate Respondent's reinstatement obligations to him as a result of that layoff. See, *Krist Oil Co.*, supra at 825; and *Rainbow Coaches*, supra at 184.

4. The June 7 discharge of Makowski

On June 3, Franks was presented a letter by Union Organizer Andes notifying Franks that Makowski was a union organizer. On June 4, Makowski phoned Andes for advice and reported his working conditions to Andes. Upon Andes' advice Makowski phoned Franks, complained about his working conditions and then asked for union wages. Makowski then met Andes at Respondent's facility where Andes directed him to ask for union wages, and gave him a typed written letter stating he was going out on an unfair labor practice strike over working conditions. Makowski then met with Franks and told him he wanted union wages and the raise was justified due to his changed working conditions since he was not working in the shop, and

he was at a jobsite where he was cutting plastic and isolated from the other employees. Franks declined the pay raise and Makowski handed him a letter typed by Andes and signed by Makowski, stating, "because of my unfair working conditions, I am going on an unfair labor practice strike." After Franks refused his request for union wages, Makowski picketed with Andes, each carrying signs naming Local 44 and with one stating "Climatep Air Conditioning On Strike for Unfair Working Conditions" and the other stating "Climatep Air Conditioning Discriminates Against Employees, Sheet Metal Workers' Local 44." It is undisputed that Andes and Makowski only picketed at Respondent's facility on June 4.

Makowski received a letter from Franks dated June 7, stating, "I respect your right to call a strike for what you believe to be unfair working conditions." The letter states since "you are no longer actively striking,"... "I will extend to you the opportunity of returning to your position at your former rate of pay until Wednesday, June 12th, 5:00 p.m. Should we not here from (you) by that time, we will consider you no longer employed by Climatep." Makowski did not respond to this letter. Makowski did sign a letter to Franks, dated November 1, 2002, drafted and mailed by Andes stating, "Please be advised that I am ending my unfair labor practice strike and I am unconditionally making an offer to return to work." Franks did not respond to this letter. He testified he had considered Makowski as having quit because Makowski failed to respond to Franks' June 7 letter.

I find that Makowski was engaged in protected union activity at the time he engaged in the strike and picketing on June 4 and therefore "it is irrelevant that no other employee joined him in striking." See, *Mauka, Inc.*, 327 NLRB 803, 804 fn. 8 (1999); *Manno Electric*, 321 NLRB 278, 281 (1996); and *Carpenters Local 925*, 279 NLRB 1051, 1059 fn. 40. I find that Makowski's strike which was in large part related to the discriminatory working conditions imposed on him after he returned to work was an unfair labor practice strike in that Franks was hand delivered a letter at the time of the strike claiming it was an unfair labor practice strike. The picket signs Makowski and Andes carried also revealed the strike was caused, at least in part, by Respondent's unfair labor practices.⁷³

I find that Franks discharged Makowski for his protected union activities by Franks' June 7 letter giving Makowski a June 12 deadline to respond and return to his former position or forfeit that position. The fact that Makowski was no longer picketing at Respondent's facility did not give Franks the right to unilaterally determine Makowski's unfair labor practice strike had ended and I find that Respondent unlawfully discharged Makowski in violation of Section 8(a)(1) and (3) of the Act by terminating his employment as a result of Makowski's failure to respond to Franks' June 7 letter. See, *Manno Electric*, supra at 294.

I also find that Makowski was privileged to reject Franks' June 7 offer of reinstatement "and preserve his ongoing entitlement to reinstatement and backpay," because he had "a reasonable fear of further discrimination against him." See *Krist Oil Co.*, 328 NLRB 825, 825 (1999). Prior to his June 3, recall Franks interrogated Makowski as to his union activity and then warned him of what happened to Falandys when Falandys returned to work because of

⁷³ The General Counsel's amendment to the complaint does not specify whether Makowski engaged in an unfair labor practice strike or an economic strike. (See, GC Exh. 1T). At the close of the hearing, counsel for the General Counsel argued that Makowski engaged in a economic strike. I have concluded this assertion was incorrect and that for the reasons set forth above the nature of Makowski' strike was fully litigated and that it was an unfair labor practice strike since it was motivated at least in part by Respondent's unfair labor practices. See, *Mauka, Inc.*, supra at 804.

Falandys' pro-union stance. Following this warning, when Makowski returned to work, he was not assigned his prior position, and then was given work assignments that he reasonably perceived were calculated and in fact served to isolate him from his co-workers. Makowski was not required to accept another job offer at Respondent in the face of Respondent's ongoing unlawful practices as a condition of preserving his employment rights there. Accordingly, as set forth above, I have found Respondent has never made Makowski a good faith offer of reinstatement following his unlawful layoff on April 16.

CONCLUSIONS OF LAW

1. Climatep Air Conditioning Co., Inc., the Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. Local 44, Sheet Metal Workers' International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

- a. Creating the impression of surveillance of employees' union activities.
- b. Coercively interrogating employees about their union activities.
- c. Threatening employees with discharge for engaging in union activities.
- d. Accusing employees of withholding information because they engaged in union activities.
- e. Informing employees that employees who engage in union activities could not be trusted, and implying that adverse consequences would take place concerning those employees.

f. Threatening to replace employees who engaged in union activities with temporary employees.

g. Informing employees their union activities were futile by stating Respondent would never go union.

h. Informing employees Respondent would shut down before going union.

i. Accusing employees of disloyalty because they engaged in union activities by labeling them in such terms as backstabbers.

j. Informing employees they would never work for Respondent again because they engaged in union activities.

k. Informing applicants that we do not want your kind working here because of their union membership and activities.

l. Threatening employees with unspecified reprisals by stating they were here but not here because they engaged in union activities.

m. Informing an employee that other employees wanted to wring his neck for engaging in union activities.

4. Respondent violated Section 8(a)(1) and (3) of the Act by:

a. On December 3, 2001, discharging employee Shane Ruggere because he engaged in union activities.

b. On April 16, 2002, laying off Mark Falandys and Scott Makowski because they engaged in union activities.

c. On June 7, 2002, discharging Scott Makowski because he engaged in union activities.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Shane Ruggere, and having discriminatorily laid off employees Mark Falandys and Scott Makowski, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from December 3, 2001, the date of Ruggere's discharge and April 16, 2002, the date of Falandys and Makowski's layoff to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷⁴

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁵

ORDER

Respondent, Climatemp Air Conditioning Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

- a. Creating the impression of surveillance of employees' union activities.
- b. Coercively interrogating employees about their union activities.
- c. Threatening employees with discharge for engaging in union activities.
- d. Accusing employees of withholding information because they engaged in union activities.
- e. Informing employees that employees who engage in union activities could not be trusted, and implying that adverse consequences would take place concerning those employees.
- f. Threatening to replace employees who engaged in union activities with temporary employees.
- g. Informing employees their union activities were futile by stating Respondent would never go union.
- h. Informing employees Respondent would shut down before going union.
- i. Accusing employees of disloyalty because they engaged in union activities by labeling them in such terms as backstabbers.
- j. Informing employees on layoff they would never work for Respondent again because they engaged in union activities.
- k. Informing applicants that we do not want your kind working here because of their union membership and activities.
- l. Threatening employees with unspecified reprisals by stating they were here but not here because they engaged in union activities.
- m. Informing an employee that other employees wanted to wring his neck for

⁷⁴ Since I have concluded Respondent never made good faith offers of reinstatement to Falandys and Makowski following their April 16, 2002, layoff, they are entitled good faith and non-discriminatory reinstatement offers, and to be made whole from the date of their layoff, minus interim earnings, including those earnings for the brief period of time each worked for Respondent following their layoff until they receive good faith offers of reinstatement. Moreover, since Makowski is entitled to a reinstatement offer and make whole remedy dating back to the April 16, 2002, layoff, I need not further address the remedy accruing to him as a result of his subsequent discharge since the remedy ordered as a result of his prior layoff cures it.

⁷⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

engaging in union activities.

n. Discharging employees because they engage in union activities.

o. Laying off employees because they engage in union activities.

p. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer employees Shane Ruggere, Mark Falandys, and Scott Makowski full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

b. Make Shane Ruggere, Mark Falandys and Scott Makowski whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Shane Ruggere and Mark Makowski, and the unlawful layoffs of Mark Falandys and Scott Makowski, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and/or layoffs will not be used against them in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by Region 4, post at its facility in Kingston, Pennsylvania, copies of the attached notice marked "Appendix."⁷⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after December 3, 2001.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 21, 2003.

Eric M. Fine
Administrative Law Judge

⁷⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT create the impression of surveillance of employees' activities on behalf of Local 44, Sheet Metal Workers' International Association, AFL-CIO, or any other union.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten employees with discharge for engaging in union activities.

WE WILL NOT accuse employees of withholding information because they engage in union activities.

WE WILL NOT inform employees that employees who engage in union activities cannot be trusted, and imply that adverse consequences will take place concerning these employees.

WE WILL NOT threaten to replace employees who engage in union activities with temporary employees.

WE WILL NOT inform employees their union activities are futile by stating the company will never go union.

WE WILL NOT inform employees the company will shut down before going union.

WE WILL NOT accuse employees of disloyalty because they engage in union activities by calling them backstabbers or similar names.

WE WILL NOT inform employees they will never work for the company again because they engage in union activities.

WE WILL NOT inform applicants we do not want your kind working here because of their union activities.

WE WILL NOT threaten employees with unspecified reprisals by stating they were here but not here because they engage in union activities.

WE WILL NOT inform employees that other employees want to wring their neck for engaging in union activities.

WE WILL NOT discharge or layoff employees because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's Order, offer Shane Ruggere, Mark Falandys, and Scott Makowski full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shane Ruggere, Mark Falandys, and Mark Makowski whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful discrimination against them in the manner instructed by the National Labor Relations Board.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Shane Ruggere and Scott Makowski, and the unlawful layoffs of Mark Falandys and Scott Makowski, and within three days thereafter notify the employees in writing that this has been done and that the discharges and layoffs will not be used against them in any manner.

CLIMATEMP AIR CONDITIONING CO., INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-7643.